IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL CONFIRMATION CASE No. 5 of 2004
With
CRIMINAL APPEAL No. 1005 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant(s)
Versus
NARAYAN SHASTRI GURU OMPRAKASHDASJI (ORIG NAME DINESHBHAI & 4 - Respondent(s)

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Appearance :
MR KT.DAVE, ADDL.PUBLIC PROSECUTOR for the State

MR YN RAVANI for CBI
MR PM THAKKAR WITH MR.MC BAROT WITH MR. TEJAS BAROT for Respondent(s) : 1 - 5.

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 01/09/2006

CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE C.K.BUCH)

(1) The District & Sessions Judge, Kheda at Nadiad has forwarded the copy of the judgment dated 11.06.2004 along with R & P, delivered by the ld. Presiding Officer & Addl. Sessions Judge (FTC No.1), Kheda at Nadiad in Sessions Case No. 369/1999 for confirmation of the death sentence awarded to the accused (appellants of Criminal Appeal No. 1005/2004), as per the provisions of sub-section (2) of section 28 R/w section 366(1) of Code of Criminal Procedure, 1973 (CrPC for short). This Court, on receipt of the proceedings for confirmation of death sentence awarded to all the five accused persons, ordered to issue notices to the District Magistrate as well as to the accused. Ld. Advocate appearing for all the five accused waived service of notice. The accused persons have assailed the impugned order of conviction and sentence by preferring the appeal i.e. Criminal Appeal No.1005/2004, mainly contending

that the order of conviction and sentence passed by the ld. Trial Judge is not sustainable in eyes of law as well as on facts available on record. Therefore, we have dealt with the confirmation proceedings along with criminal appeal preferred by the appellants accused as the same has been admitted by this Court vide order passed earlier.

(2) Mr. PM Thakkar, ld. Senior Counsel has appeared for all the accused appellants with ld. Counsel Mr. MC Barot and with ld. Counsel Mr. Tejas Barot. Of course, all the accused persons were not represented by the same lawyer when the proceedings were before the trial Court, however, before this Court, all the accused have assailed the legality and validity of the order of conviction and sentence passed by the ld. Trial Judge. Mr. YN Ravani, Ld. Counsel has appeared for Central Bureau of Investigation (CBI for short)- the prosecuting agency and Mr. KT Dave, ld. APP has appeared for the District Magistrate as well as for State of Gujarat.

(3) It is necessary to state the facts placed by the prosecuting agency- CBI before the trial Court at the conclusion of the investigation and submission of the report under section 173(2) of CrPC.

(i) It is alleged by the CBI that one of the main temples of Shri Swaminarayan Sect of Vadtal Gadi (Laxminarayan Dev) is situated at Vadtal and there are number of temples at other places in the country. As per the order of this Court passed in 1976, the spiritual/religious authority of the Sect is vested in the hereditary “Acharya” and the day to day administration and management of the temples is vested in a Board of Trustees. As per High Court Order, the Board consists of 8 Trustees, the Chief Kothari being the ex-officio member. In 1998, Shri Ajendra Prasad was the spiritual/religious head of the Sect. Gadadharanandji was elected as the Chairman of the Board of Trustees on 11.04.1998. Shri Bhakti Kishore Dasji was the Chief Kothari and Shri Narayan Shashtri was the Assistant Kothari.

Shrijicharan Swami was also informally working as Assistant Kothari in the temple. Soon after taking over as Chairman of the Board of Trustees, Gadadharanandji had planned to transfer Shri Narayan Shastri and Shrijicharan Swami from the Vadtal temple Kothari Office. The agenda dated 16.04.1998 was circulated amongst the Board of Trustees for the meeting of the Board to be held on 22.04.1998 in which transfer of Kotharis, inter alia, was one of the matters to be considered.

(ii) Accused Shri Narayan Shastri and Shrijicharan were deeply disturbed due to their impending transfer from the Vadtal temple Kothari office. After they failed to win the confidence of Gadadharanandji, and the pressure brought to bear on him did not work, they hatched a criminal conspiracy with co-accused and planned to kill Gadadharanandji pursuant to which he was abducted by accused Madhavdas Swami and Ghanshyamdas Swami from Vadtal temple on 03.05.1998 and taken to Sant Niwas in Navli Gurukul Complex where accused Shrijicharan and

Vijay Bhagat joined them. Gadadharanandji was last seen alive with the aforesaid accused and the badly burnt dead body was found in the morning of 04.05.1998 near Barothi village in the jurisdiction of PS Bichchhuwada, Dist.: Dungarpur (Rajasthan).

(iii) Investigation carried out by CBI had disclosed that Shri Narayan Shastri hatched a criminal conspiracy in April, 1998 at Vadtal and Navli Gurukul complex along with his associates Shrijicharan Swami, Madhavdas Swami, Ghanshyam Prasad and Vijay Bhagat to abduct and kill Gadadharanandji and pursuant to the said criminal conspiracy, the accused aforesaid committed the following acts of omission and commission:-

(a) 10/15 days prior to the abduction and killing of Gadadharanandji, accused Shri Narayan Shastri sounded Jagdish Parmar to eliminate Gadadharanandji for a consideration of Rs.4 to 5 lakhs, but Jagdish Parmar declined to accept the offer;

(b) On 20/21.04.1998, accused Shri Narayan Shastri threatened Gadadharanandji that he would create havoc if he was transferred from the Kothari office and that consequences of such action would not be good for Gadadharanandji.

(c)In the night of 21.04.1998, accused Shri Narayan Shastri sent Anupam Parmar, a peon in the Kothari Office, to the room of Gadadharanandji for calling him to the Kothari Office where accused Shri Narayan Shastri, Madhavdas swami and some others were present, on the pretext of having discussion with him regarding the meeting of the Board of Trustees to be held on 22.04.1998. Gadadharanandji did not come to Kothari office as he apprehended that he would be physically harmed by Shri Narayan Shastri and Shrijicharan.

(d) Accused Shrijicharan Swami asked Ghanshyamdas Bhagat, Sunil Bhagat, Vishnu driver to vacate the rooms in Sant Niwas in Navli Gurukul Complex at the behest of accused Shri Narayan Shastri on 03.05.1998. As per the plan,

Gadadharanandji was to be lodged in Sant Niwas after being abducted from the Vadtal Temple Complex.

(e) Accused Madhavdas Swami and Ghanshyam Prakash by deceitful means, induced Gadadharanandji to accompany them from his room in Vadtal Complex to Navli Gurukul Complex in a blue colour Maruti van bearing No.GJ-06-A-1894 in the afternoon of 03.05.1998. After abducting Gadadharanandji, the aforesaid accused took him to Sant Niwas in Navli Gurukul Complex and lodged him there.

(f) On 02.05.1998, accused Shrijicharan Swami asked Rakshit Shah to arrange a girl for Gadadharanandji's pleasure on 03.05.1998. Rakshit Shah, along with a call girl named Minaxi Patel visited Sant Niwas on 03.05.1998 and Gadadharanandji enjoyed Minaxi Patel. Payment of Rs.1000/- was made to Rakshit Shah by accused Shrijicharan.

(g) Gadadharanandji was last seen alive in the company of accused Shrijicharan Swami,

Madhavdas Swami, Ghanshyam Prakashdas Swami and Vijay Bhagat in the afternoon of 03.05.1998 in Sant Niwas at Navli Gurukul Complex.

(h) Accused Madhavdas Swami and Vijay Bhagat were seen leaving Navli Gurukul Complex at about 5.30 p.m. On 03.05.1998 in Maruti Van No. GJ-06-A-1894. They drove to the jungle area near village Barothi in the jurisdiction of PS Bichchhuwada in Dungarpur District (Rajasthan) from where burnt dead body of Gadadharanandji was found by the Rajasthan police on 04.05.1998.

(i) Accused Shri Narayan Shastri made payment of Rs.30,000/ to accused Shrijicharan Swami for meeting with expenditure of abduction, killing and disposal of dead body of Gadadharanandji. Accused Shri Narayan Shastri also made a payment of Rs.50,000/- to accused Ghanshyam Prakashdas in May, 1998. Accused Shri Narayan Shastri also made a payment of Rs.1.00 Lakh to the accused Madhavdas Swami in August,1998 as a consideration for killing Gadadharanandji. The aforesaid payments were recorded in the

documents recovered in the searches conducted in the residential premises of accused Shri Narayan Shastri on 28.03.1999.

(j) Accused Madhavdas Swami intentionally burnt his blue colour Maruti van No. GJ-06-A-1894 on 5th/6th May,1998 with the intent to destroy evidence as this vehicle had been used in the abduction of Gadadharanandji from Vadtal temple to Navli Gurukul complex as also in the disposal of the dead body aforesaid. This vehicle, though actually registered in the name of Lakshmiprasad Swami, really belonged to accused Madhavdas Swami.

(iv) On 2nd & 3rd of April, 1999 accused Madhavdas Swami voluntarily made a disclosure regarding the disposal of Gadadharanandji's dead body in the jurisdiction of PS Bichchuwada in Dungarpur District and led the Investigation Officer and the Panchas to the spot. During spot inspection, the I.O. Recovered pieces of burnt bones, ashes mixed with foilage and denture clip etc.

(v) Accused Shri Narayan Shastri made extra-judicial confession before Kusumben Patel two and half months after the incident and admitted having killed Gadadharanandji with the help of other accused.

(vi) The dead body of Gadadharanandji was recovered from near village Barothi in the jurisdiction of PS Bichchuwada in Dungarpur District (Rajasthan) by SHO PS Bichchuwada on 04.05.1998. The post-mortem of the dead body was conducted by Dr. RK Gupta on the spot on 04.05.1998. In the postmortem report, Dr. Gupta opined as follows:-

Cause of death : Asphyxia

Mode of death : Strangulation.

Dr.Gupta also preserved elbow joints, wrist joints, gold plated teeth and blood sample of the deceased for forensic tests etc.

(vii) The SHO, PS Bichchuwada recovered a few items from the place where the dead body of Gadadharanandji was burnt i.e. a key, a half

burnt piece of cloth etc. SHO, PS, Bichchuwada also drew a sketch of the spot and observed that the tyre marks found on the spot appeared to be that of a Maruti Van.

(viii) On the basis of the recovery from the spot by the Rajasthan Police, Jatin Bhagat has stated that the key belongs to deceased Gadadharanandji. Dr. Upen Diwanji, Dentist of Gadadharanandji, has stated that he had made golden dentures for deceased Gadadharanandji.

(ix) The elbow joints, wrist joints and blood samples of the deceased have been sent to CDFD, Hyderabad for DNA fingerprinting and the expert opinion is awaited. The same will be produced in the Court as and when received.

(x) The handwriting Expert's opinion has also been sought in regard to the entries made by the accused Shri Narayan Shastri in his records showing the payments made to accused Shrijicharan, Madavdas swami and Ghanshyam Prakash. The expert opinion is awaited of GEQD,

Hyderabad and the same will be submitted in the Court as and when received. The lock and keys have been forwarded to CFSL/ New Delhi for expert opinion and the report is awaited. Similarly, the Maruti Van bearing No. GJ-06-A-1894 of Madhavdas Swami has also been examined by the officials of CFSL/ New Delhi and the report is awaited. The reports from the CFSL, will be submitted as and when received.

(xi) According to CBI, the accused persons have committed offences punishable under section 120-B R/w sections 302, 364 and 201 of IPC substantively.

(4) Initially, one Nautam Swami Guru Prakashdas Swami, Premswarup Swami and Acharya of Vadtal Gadi along with other two persons i.e. Ghanshyam Prakash Swami and Chimanbhai Parmar- one of the employee of the temple trust, were also arrested and during investigation were treated as accused, but while submitting final report under section 173 of CrPC, CBI requested the Court to discharge other five persons for want of

evidence against them. The ld. CJM accepted the report as prayed and registered the criminal case being Criminal Case No. 2681/1999 against the present appellants accused and ld. CJM, in turn, committed the present appellants accused to the Court of Sessions under section 209 of CrPC vide order dated 10.08.1999. The Court of Sessions at Nadiad, on committal, registered the case as Sessions Case No.369/1999 against all the present appellants accused. It appears from the record that before trial Court framed formal charge against the accused persons, CBI submitted supplementary chargesheet and placed on record statements of more witnesses examined and some more documents collected. CBI prayed for addition of 88 documents and requested the Court to add names of the witnesses in the final report at Sr.Nos.57 to 111. Muddamal article Nos. 1 to 21 were also requested to be taken up as relevant piece of evidence. After affording opportunity of being heard to the accused persons, the ld. CJM accepted the supplementary chargesheet and accused persons were provided with additional set of documents.

(5) Shri Jatin Bhagat, a disciple of Guru Gadadharanandji, had made a formal complaint on 05.05.1998 about missing of his Guru Gadadharanandji since 03.05.1998. Prior to filing of the complaint, police personnels of Chaklashi Police Station had started search of Guru Gadadharanandji accompanied by the disciples and concerned persons of the temple and formal entry popularly known as “Janvajog Entry” was made in Chaklashi Police Station on 05.05.1998 (exh.233). Prior to informing Chaklashi Police Station, as everybody had failed in searching missing Guru Gadadharanandji, the disciples of Guru Gadadharanandji who were worried, meanwhile had approached Acharya-Gadipati Shri Ajendraprasadji and the disciples including Jatin Bhagat were asked by him to wait for a day or two hoping for return of Guru Gadadharanandji. But as there was no trace of Guru Gadadharanandji, Jatin Bhagat informed Chaklashi Police Station on 05.05.1998 about missing of his Guru Gadadharanandji. Initially, Nadiad Town Police Station was entrusted the investigation and thereafter,

State CID Crimes had taken over investigation considering the sensitivity involved in the matter. The investigation remained with Nadiad Town Police for five days and with CID Crimes from 12.05.1998 to 05.10.1998.

Meanwhile, Jatin Bhagat approached this Court with a petition under section 482 of CrPC being Cri. Misc. Application No.3996/1998 on 21.09.1998 and mainly prayed that (i) police may be directed to register the offence; (ii) that investigation of the case may kindly be directed to be transferred to CBI and CBI also may be asked to investigate the matter and to give periodical report to the High Court and about whereabout of Gadadharanandji. This Court, vide order dated 05.10.1998, ordered CBI to investigate the matter. Thus, CBI took over the investigation in compliance with the order passed by the High Court and registered the complaint as per the grievance expressed in the application preferred before this Court. Copy of the FIR registered by CBI on 29.10.1998 being RC No.3/ACB/98 is on record at Exh.267. The trial

Court framed charge against the accused persons vide Exh.11 on 07.06.2000. Before initiation of formal trial against the accused persons committed to the Court of Sessions, Jatin Bhagat had approached this Court making grievance that he has not been given an opportunity of being heard before accepting the report submitted by CBI whereby CBI had decided to drop the charges for want of evidence against five accused persons. This Court, vide order dated 06.07.2001 in Cri. Misc. Application No. 6742/2000 (Coram: BJ Shethna, J), directed the ld. Magistrate to issue notices to all concerned including the petitioner Jatin Bhagat and passed appropriate orders on merits on the strength of the papers of investigation relied on by CBI. Ld. CJM, Kheda at Nadiad, in compliance of the order passed by this Court, passed a speaking order after hearing all concerned holding that no error can be said to have been committed in dropping the charge against five accused persons, though initially they were arrested and treated as an accused till the date of submission of final report.

This order of ld. CJM accepting the report as submitted by CBI, has not been assailed.

(6) Considering the report/chargesheet submitted by CBI and the facts emerging from the allegations made by the prosecution, the ld. Trial Judge has framed the charge on 07.06.2000 (Exh.11) for distinct offences and to appreciate the arguments that have been advanced, we would like to reproduce relevant portion of the charge translated in English as the same is in vernacular Gujarati:-

> " That you accused persons along with others,with an intention to commit culpable homicide amounting to murder, hatched a criminal conspiracy during April/May-1998 to kidnap (abduct) by an illegal act, Brahmchari Shri Gadadharanandji- Chairman of Temple Committee i.e. Board of Trustees of Vadtal Swaminarayan Temple, from his residence situated at Vadtal Swaminarayan Temple and thereby, you accused persons have committed an offence punishable under section 120-B of Indian Penal Code.

Further, as a part of the aforesaid criminal conspiracy and in furtherance of the performance of the aforesaid criminal conspiracy,you Accused Nos.3 & 4 kidnapped/ abducted Brahmchari Gadadharanandji between 02.05.1998 and 04.05.1998 from his residence situated at Swaminarayan Temple with a view to commit culpable homicide amounting to murder and, thereby you accused Nos. 3 & 4 have committed an offence punishable under section 364 of Indian Penal Code. And you accused Nos. 1, 2 & 5, aided and abetted in the aforesaid act of kidnapping/ abduction to fulfill the criminal conspiracy hatched and thereby you accused Nos. 1, 2 & 5 along with you accused No. 3 & 4 have committed offence punishable under section 364 R/w section 120-B of the Indian Penal Code.

In the alternative, at the same time and place, you accused, in collusion with each other, formed common intention to kidnap/ abduct Brahmchari Gadadharanandji to commit culpable homicide amounting to murder

of Brahmchari Gadadharanandji and in furtherance of the aforesaid intention, you accused have kidnapped/ abducted Brahmchari Gadadharanandji with a view to commit culpable homicide amounting to murder and, thereby, you accused have committed an offence punishable under section 364, 34 of Indian Penal Code.

In the alternative, at the same time and place, you accused persons aided and abetted each other in the illegal act of kidnapping/ abduction of Brahmchari Gadadharanandji with a view to commit culpable homicide amounting to murder and thereby you accused have committed an offence punishable under section 364 R/w sec.114 of Indian Penal Code.

Further, you accused persons, as a part of and to fulfill the aforesaid criminal conspiracy, after abducting/ kidnapping Brahmchari Gadadharanandji from his residence situated at Vadtal Swaminarayan Temple, you accused with an intention to

commit murder, caused injuries to Brahmchari Gadadharanandji which are likely to cause death of Brahmchari Gadadharanandji between 03.05.1998 and 04.05.1998 at any place between Vadtal and Navli of District Kheda and village Barothi, District: Dungarpur, Rajasthan and caused death and thereby you accused persons have committed an offence punishable under section 302 R/w sec.120-B of the Indian Penal Code.

In the alternative, you accused at the same time and place, with a common criminal intention and in furtherance of the aforesaid common intention, committed murder of Brahmchari Gadadharanandji and thereby committed an offence punishable under section 302 R/w section 34 of the Indian Penal Code.

In the alternative, at the same time and place, you accused have aided and abetted each other in illegal act of committing murder of Brahmchari Gadadharanandji and thereby you accused have committed an offence punishable under

section 302 R/w 114 of the Indian Penal Code.

Further, you accused persons, at the same time and place, after commission of the offence of kidnapping/ abduction and murder, knowing or having reason to believe that an offence has been committed, with the intention of screening the aforesaid offence and with an intention to destroy/disappear the evidence, destroyed the legal evidence qua the commission of the said offence by setting ablaze the dead body of Brahmchari Gadadharanandji at village Barothi, District: Dungarpur (Rajasthan) by shifting his dead body from Vadtal and/or Navli and also by disposing of the articles which were put on the dead body and also by disposing of the Maruti Van bearing No. GJ-6A-1894 used for the commission of the aforesaid offence and thereby you accused have committed an offence punishable under section 201 of Indian Penal Code.

In the alternative, at the same time and place, as a part of your aforesaid

criminal conspiracy, you accused persons kidnapped/ abducted Brahmchari Gadadharanandji and thereafter committed his murder and after committing his murder, with an intention to destroy/ disappear the legal evidence, with that intention and knowledge, disposed of the dead body by setting ablaze and also disposed of the articles put on on the dead body and also disposed of the vehicle used in the commission of the offence and thereby you accused have committed an offence punishable under section 201 R/w Sec.120-B of Indian Penal Code.

(7) To bring home the charge, the prosecution has examined 64 witnesses. Names of all these witnesses examined and the documents tendered in evidence have been mentioned in para-4 of the impugned judgment. The ld. Trial Judge has tried to categorize these witnesses and documents. For the purpose of the present judgment, we would like to divide witnesses and documents bit in a different way for the convenience of evaluation

and appreciation of the judgment under challenge.

PART : I

(A) Witnesses named in Group: B

Sr.No.	Name	Exh.No.
(1)	Jatinkumar Suryakant Gotari	101
(2)	Yashwantray Bapalal Trivedi	113
(3)	Ismailbhai Adambhai Vora	133
(4)	Chandraprakash Swami	139
(5)	Laxmiprasad Vishnujivandas	140
(6)	Ramanbhai Dahyabhai Parmar	151
(7)	Nazirmiya Mizammiya	152
(8)	Chimanbhai Dahyabhai Parmar	153
(9)	Jayantibhai Chandubhai Patel	154
(10)	Fatehsinh Somabhai Parmar	157
(11)	Anupbhai Kishabhai Parmar	162
(12)	Jagdishbhai Ramsingbhai Parmar	163
(13)	Kinjalkumar Nanalal Joshi	201
(14)	Premvatinand Guru Harikrishna	207
(15)	Durgeshbhai Natubhai Bhatt	210
(16)	Kapilbhai Narmadashankar Joshi	211
(17)	Kusumben Girishbhai Patel	212
(18)	Dixitkumar Bhagwatprasad Dave	213

(19)Nagjibhai Kanjibhai Patel 225

(20)Premswarup Swami Guru Vasudev Charandasji. 226

(21)Santoshkumar Shantilal Panchal-

(B) Witnesses named in Group: C

Sr.No.	Name	Exh.No.
(1)	Sureshbhai Hargovinddas Thakkar	159
(2)	Shashtri Hariprakashdasji Guru Vishnuprasad.	160
(3)	Babubhai Guru Haricharandas	161
(4)	Rakshitkumar Pannalal Shah	165
(5)	Ghanshyam Bhagat Guru Gopinath	227
(6)	Utsav Dipeshbhai Tanna	228
(7)	Dhirenbhai Jayantilal Lariya	239
(8)	Minaxiben Himmatbhai Patel	247

PART : II PANCH WITNESSES :

Sr.No.	Name	Exh.No.
(1)	Ramanbhai Maganbhai Parmar	166
(2)	Dineshbhai Gordhanbhai Patel	168
(3)	Gautambhai Dineshbhai Thakor	187
(4)	Sunilkumar Indulal Purohit	197
(5)	Mafatlal Ranchhodbhai Oza	200
(6)	Mahendrabhai Vishnubhai Vyas	234

(7)Pravinbhai Purshottambhai Patel238

(8)Kiranbhai Dhanjibhai 134

Following 85 documents are tendered in evidence:-

Sr. No	Particulars	Exh.No.
1	Application given by witness Jatin Bhagat at Chaklashi Police Station.	103
2	Chaklashi Police Station Diary Entry dated 05.05.1998	233
3	Application filed before Hon'ble Gujarat High Court being Misc.Appl.No.3996/1998 dated 21.09.1998	105
4	Letter dated 16.10.1998 by CID Crime Br.	278
5	First Information Report RC No.3/ACB/98 CBI, Mumbai dated 29.10.1998	267
6	Application given to ld. CHM, Nadiad for addition of sec.364 of IPC dt;26.03.1999	298
7	Report dated 06.04.1999 given to ld. CJM, Nadiad for addition of Sec.302 of IPC.	299
8	Wireless message made by Chaklashi Police Station	257
9	Panchanama of the place of offence made by Chaklashi Police Station.	169
10	Panchanama dated 02.04.1999 disclosure of place of offence by Accused No.3 Madhavdas	188
11	Panchanama of recovery of articles from the place of offence dated 03.04.1999	191
12	Panchanama regarding recovery of muddamal from Bichchuwada Rajasthan	192

Sr. No	Particulars	Exh.No.
	Police Station dated 04.04.1999	
13	Inquest Panchanama of dead body dated 04.05.1998 made by Bacchic Police Station.	250
14	Panchanama of place of offence dated 04.05.1998 shown by Bichchuwada Police Station.	252
15	Panchanama dated 04.05.1998 of the recovery of articles from the place of offence made by Bichchhuwada Police Station.	253
16	Panchanama of cremation of the dead body dated 04.05.1998	254
17	Panchanama dated 18.04.1999 of disclosure of place of offence at Navli Gurukul by Accused No.5 Vijay Bhagat.	198
18	Panchanama of Maruti van made at Gurudatt Guarage on 15.06.1999	135
19	Panchanama dated 28.03.1999 of search of the residential premises of Accused No.3.	236
20	Panchanama dated 28.03.1999 of search of the residential premises of Accused No.3	235
21	Panchanama dated 28.03.1999 of search of the residential premises of Accused No.2	246
22	Panchanama dated 16.03.1999 of the articles found from the room of Gadadharanandji.	167
23	Panchanama dated 08.04.1999 of recovery of one lock with two keys from witness Jatin Bhagat.	104
24	Panchanama dated 02.05.1999 as to the identification of accused persons through photographs by witness Minaxi	202
25	Panchanama dated 28.03.1999 of the search of the residential premises	244

Sr. No	Particulars	Exh.No.
	of Accused No.1 Narayan Shashtri	
26	Receipt dated 04.04.1999 given against the articles received from Bichchuwada PS	290
27	Information dated 04.05.1998 given by witness Mangal Dhula to Bichchuwada PS	249
28	Post Mortem Report given by Dr. Rajkumar Gupta.	269
	DOCUMENTS RELATING TO INSURANCE COMPANY	
29	Application dated 06.05.1998 given to Insurance Company by Accused No.3	129
30	Receipt Memo dated 15.12.1998 regarding the papers of vehicle GJ-6A-1894 received from Insurance Company.	132
31	Spot Inspection Report dated 09.05.1998 of Insurance Company	126
32	Claim Security Note dated 18.08.1999 of vehicle No. GJ-6A-1894	130
33	Photographs with negative of vehicle No. GJ-6A-1894	127
34	Claim letter of Insurance Company dated 24.08.1998	131
35	Certificate-cum- Policy Schedule from 13.02.1998 to 12.1999	124
36	Registration Book of Van No. GJ-6A-1894	125
37	Letter dated 15.03.1999 addressed to Gurudatt Guarage.	150
	DOCUMENTS RELATING TO FSL	

Sr. No	Particulars	Exh.No.
38	Letter dated 24.02.1999 addressed to CLSL by SP of CBI	144
39	-do- letter dated 15.09.1999	145
40	Report dated 31.12.1999 of CFSL, Delhi	146
41	-do- dated 27.10.1999	147
42	-do- dated 03.12.1999	148
	OTHER DOCUMENTS	
43	Receipt dated 03.10.1999 of seizure of Proceeding Book of Swaminarayan Trust, Vadtal	119
44	Original Proceeding Book of Swaminarayan Trust from 14.11.1997 to 05.10.1998	116 to 118
45	Receipt dated 05.01.1999 regarding seizure of records of the trust	122
46	Agenda-cum-Circular dated 11.04.1998	120
47	-do- dated 22.04.1998	121
48	Receipt of seizure of photographs dated 18.11.1998 of deceased Gadadharanandji	102
49	Photographs of deceased Gad	306
50	Receipt of case papers seized from Dr. Upen Diwanji	97
51	Case papers of the treatment of Gadadharanandji dated 20.03.1993	95
52	Case Book of Dr. Diwanji	96
53	Letter dated 13.05.1999 written to CBI regarding blood sample of witness Radiyatba	110
54	Letter dated 13.05.1999 written by CMO of Civil Hospital to CBI	112
55	Letter dated 9/13.05.1999 written by PI, CBI addressed to Civil Hospital	111
56	Receipt dated 14.05.1999 regarding receipt of blood by CDFD, Hyderabad	182

Sr. No	Particulars	Exh.No.
57	Letter dated 15.09.1999 written by SP, CBI to AC.FSL	143
58	Report dated 29.10.1999 of CFSL, Delhi regarding lock & keys	142
59	Letter dated 26.04.1999 of CBI Delhi addressed to CFC&M, Hyderabad.	273
60	Forwarding Note for letter at Sr.No.59 dated 13.05.1999	275
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14 articles of muddamal were produced before the Court and in the background of submissions that have been made before us, we have called for relevant muddamal articles from the trial Court and such muddamal articles are before this Court. Out of articles called for

from the trial Court, we have seen following muddamal articles:-

(i)All the three keys having marks of Tri Circle China.

(ii)Lock having similar mark i.e. Tri Circle China.

(iii)Video Cassette recorded and tendered by P.W.29 Vasant Veljibhai Patel (exh.177);

(iv)Video Cassette recorded by P.W.28 Dharmesh Mahesh Thakar (exh.176) allegedly recorded at Gurukul Navli and the photographs of deceased Gadadharanandji which were shown to some witnesses.

(8) We have also gone through the questions asked to the accused persons while their examination under section 313 of CrPC. The ld. Counsel appearing for the accused have taken us through the entire decision under challenge with a view to point out the alleged errors committed by the trial Court in evaluating the evidence, in appreciating the oral evidence along with the error of law committed while drawing inferences and recording ultimate findings. It is true that the ld. Trial Judge, at some

places, has tried to consider the evidence which can be said to be inadmissible evidence as per the settled legal position and has also read contradictions proved as a substantive piece of evidence. The question posed before us is whether such a judgment can be upheld by this Court directly or indirectly? It is also true that the ld. Trial Judge was under an obligation to bracket the inadmissible portion of panchanamas that have been drawn by the investigating agency at various stages of investigation, but during the course of hearing, we have informed the ld. Counsel appearing for the parties that no inadmissible part of evidence or unbracketed portion of evidence found on record and/or referred to by the ld. Trial Judge, shall be looked into for the purpose of present judgment. The ld. Trial Judge has ultimately held that the prosecution has proved all the relevant circumstances and the link between the accused and guilt has been successfully established. The ld. Trial Judge has also held that accused Nos. 1 & 2 having command over the management of the office of

Kothari of Vadtal Temple Trust, were raising their hands and enjoying the ill gotten income and other benefits from the purchases of items and other valuables for the temple. Accused No.1, at relevant point of time, was Assistant Kothari involved in mal-practice and the accused No.2 was helping him in financial matters and day to day management of the office of Kothari. It is held that Guru Gadadharanandji after assuming the office of Chairman of Vadtal Temple Trust, was in a mood to change the person and persons in the office of Kothari of various temples of the trust under Vadtal Gadi and also of main temple at Vadtal and, therefore, he had started taking necessary steps in couple of days from the date of his assumption on the post of chairmanship of Temple Trust. We would like to reproduce relevant provisions of the Scheme of the trust framed by the High Court empowering the chairman and also showing importance of the office of Kothari in temple.:-

VADATAL CONSTITUTION OF BOARD OF MANAGING TRUSTEE :

(18)(a) The Board of Managing Trustees shall consists of 8 members of provided that the Chief Kothari shall always be a representative

of the constituency of Tyagis.

(b) xxxx xxxx xxxx

(i) to (ii) xxxx xxxx

(iii) The Chief Kothari of Vadtal temple shall be ex-office member with no right to Vote in matters of appointment, re-appointment, dismissal, removal, discharge or suspension of Chief Kothari and/or the owner Kotharis of subordinate temples or in any matter in which action of the Kothari has been the subject matter of complaint before the Board.

xxxx xxxx xxxx

OFFICE BEARERS :

(22) (a) A Chairman elected from its members as per clause 8(b) shall preside over the meetings of the Board. In absence of the Chairman at any meeting the members present shall appoint one from amongst themselves to be the Chairman of that particular meeting.

(b) Every resolution submitted to the meeting

shall be decided by a majority of the members present at the meeting and voting on the resolution or question. Each member shall have one vote but the chairman shall have a second or casting vote, in case of tie, even if he has voted previously once on the question or the resolution.

(23) The Board shall elect one member from amongst themselves to as a Secretary, the Chief Kothari shall act as Joint Secretary.

VI MEETINGS OF BOARD

24 (a)The Board shall ordinarily hold ordinary meeting themselves to month on the full moon day at Vadtal.

(b) A notice of seven clear days of the agenda of such ordinary meeting shall be given to the members by the President.

(c) The Chairman or the Chief Kothari may on his own motion and shall on the requisition of any three members of the Board call a special meeting and a notice of the

agenda of such a meeting shall be given three clear days in advance of the date of such meeting.

(8) According to the ld. Trial Judge, the prosecution has proved that the conspiracy was hatched in secrecy between accused Nos. 1 & 2 to 5 to murder Guru Gadadharanandji. The ld. Trial Judge has dealt with practically all the points that were placed by the prosecution and resisted by the ld. Counsel defending the accused persons in the background of the answers given by the important witnesses examined by the prosecution and other evidence led by prosecution. Some evidence has been led directly, some part of evidence available on record can be said to be indirect evidence, has also been considered. According to the ld. Trial Judge, it is possible to infer certain things from the totality of the evidence led either by individual witness or group of witnesses and/or from the totality emerging from the evidence so as to accept the say of the prosecution as to sufficiency of evidence to prove a given/alleged circumstance. The ld. Trial Judge has recorded a

positive finding that deceased Gadadharanandji has been done to death in a planned manner and the same is cold-blooded murder. He was taken/abducted out of temple premises by accused No.3 in his blue maruti van in furtherance of the common intention and in fulfillment of the conspiracy hatched and Guru Gadadharanandji was taken to Navli Gurukul Complex. Accused No.5 Vijay Bhagat had disclosed and shown the place of actual commission of offence i.e. place of murder at Navli Gurukul Complex. Thereafter the dead body of Gadadharanandji was taken out of Gujarat and taken in the State of Rajasthan. Thereafter, an attempt to destroy the dead body of the deceased Gadadharanandji was made in the area falling under the jurisdiction of Bichchhuwada PS of State of Rajasthan by setting on fire the dead body with the use of inflammables like petrol, diesel etc. The ld. Trial Judge has held that accepting the evidence of expert as well as some witnesses examined, there is no confusion as to the identity of the dead body found within the jurisdiction of Bichchhuwada Police Station in the morning of

04.05.1998 that the dead body found was of missing Gadadharanandji. The ld. Trial Judge has inferred that only because of the guilt and conduct of the accused, they themselves have provided important clues and evidence to the investigating agency and to the prosecution. Certain crucial questions asked to the accused persons and answers given in response thereof also have been considered by the ld. Trial Judge for recording the guilt. The ld. Trial Judge has further held that the accused No.3, with a view to save himself from the entire gamut of offence, had even destroyed his blue maruti van by setting ablaze with the help of inflammables Thereafter, he tried to create a story, but the stand taken by accused No.3 in claiming the amount on account of loss of motor vehicle, if considered, is an important circumstance as to his involvement in the conspiracy. The statement made by the accused No.3 before the Insurance Company/ Agent and his conduct has been appreciated by the ld. Trial Judge while evaluating the evidence led by the prosecution to prove other circumstances

that had emerged during investigation. It is held by the ld. Trial Judge that accused No.3 was the person who took CBI team at the spot where dead body of deceased Guru Gadadharanandji was thrown in a ditch and thereafter set on fire. Till that point of time, nobody- either CID Crimes or CBI- was aware or knowing about the place from where dead body of deceased Guru Gadadharanandji was found lying on 04.05.1998 i.e. the day next from the date of his abduction. It is also observed that Bichchuwada Police was also not aware and h as not informed either to Kheda District Police or CBI about undetected crime and, therefore, the evidence led by way of panchanama drawn under section 27 of the Indian Evidence Act can be looked into. On careful reading of the impugned judgment, it is easy and possible for us to infer and say that the reasons for recording ultimate findings proceeded in the manner stated herein above.

(9) The impugned judgment is assailed by the appellants-accused on various grounds mentioned in para-7 of the memo of criminal appeal. It is not necessary to mention all the grounds here in

the present judgment, but it would be sufficient if the same are dealt with simultaneously while dealing with the submissions made before us by ld. Sr. Counsel Mr. PM Thakkar for the accused convicts.

(10)(i) According to ld. Sr.Counsel Mr. Thakkar for the appellants-convicts, the prosecution has hopelessly failed in proving the charge of conspiracy, even if tested from different angles and there is absolutely no material on record to show even prima facie existence of criminal conspiracy between the accused. It is submitted further that so far as the evidence led by the prosecution with a view to prove motive is concerned, the suggestions made by the prosecution are vague. It is argued that there was a proposal for transfer of Kotharis and Pujaris including the transfer of Kothari of Vadtal temple also. It is alleged by the prosecution that as the Kothari of Vadtal temple was likely to be transferred, the persons sitting in the office of the Kothari were displeased. However, Kothari who is one Bhakti

Kishoredas sitting in the office as Kothari in main Vadtal temple, is not an accused. There is no suggestion anywhere by the prosecution that there was no proposal for transfer of Assistant Kothari or any other office-bearers of Vadtal Temple except the main Kothari. Even for the transfer of Kothari, there is hardly any material because the transfer is not within the domain of Chairman alone and such issues are handled by the Temple Board. It is admitted by the prosecution witnesses that the ultimate decision is being taken in the case of transfer of a Kothari of a temple by the Temple Board i.e. Board of Trustees and the Board of Trustees consists of 7 persons. Agenda (exh.121) placed by the prosecution on record merely mentions transfer of Kotharis and Pujaris and it is inferable that that could have affected the transfer of any of the 7 to 8 temples under Vadtal Gadi (main temple). Moreover, the meeting as proposed as per the Agenda, does not carry item specifically as to the transfer of Kothari of Vadtal main temple. On the contrary, according to ld. Sr.Counsel Mr. Thakkar, it

appears from the prosecution case that after persuasion from Acharya, the proposed move by deceased Gadadharanandji was dropped or cancelled.

(ii) According to P.W.3, Jatin Bhagat, who on oath, has disclosed before the High Court in his petition that it was some other persons i.e. Nautam Swami and Premswarup Swami-initially arraigned as an accused by CBI and later on dropped while submitting final report- who were probably behind the disappearance of the deceased as they were displeased with the management of deceased Gadadharanandji and there were inimical feelings between the deceased and Nautam Swami since 1993-94. These inimical feelings had resulted into filing of a criminal complaint and it is on record that there was bitterness in the relationship between the two. In the first version, P.W.3 Jatin Bhagat in the form of a writ petition, pleaded before the High Court that some serious steps are required to be taken in the case of missing of his Guru Gadadharanandji (deceased). In his deposition,

the very witness has stated that the deceased had good relations with every one except Nautam Swami and Premswarup Swami. According to P.W.3 Jatin Bhagat, these two alone had motive.

(iii) It has been argued by ld. Sr.Counsel Mr. Thakkar that at the instance of P.W.3 Jatin Bhagat, both Nautam Swami and Premswarup Swami were arraigned as Accused. Both of them were asked to undergo Lie Detector Test along with other accused. All other persons had undergone said test, but initially both these persons failed to respond for the said test on flimsy pretext, but Nautam Swami thereafter had undergone said Test and was found lieing. Rest of the other persons under suspicion including the present accused were found to be truthful by the report of Lie Detector Test. So, according to ld. Sr.Counsel Mr. Thakkar, both the aforesaid persons had motive and one of them had also failed in Lie Detector Test. However, both of them have been dropped by the CBI as accused while submitting final report. The assertion, therefore, of Mr. Thakkar is that so far as

present accused persons are concerned, they had no motive at all and that there was much strong motive for Nautam Swami and Premswarup Swami as disclosed by P.W.3 Jatin Bhagat on oath. It is pertinent to note that no investigation is carried out in this regard nor the same is pointed out in respect of those two persons who were otherwise shown as accused by CBI and no material is also placed to justify the grounds for their exclusion by the CBI when final report was submitted. It has been further submitted by Mr. Thakkar that so far as motive is concerned, nothing has been pointed out against accused Nos. 3, 4 & 5 because they were neither Kothari nor Assistant Kothari. The prosecution has even failed to produce any material to show that there was any proposal for transfer of Assistant Kothari at any point of time. The same is the situation with accused Nos. 1 & 2 also. So far as allegation as to irregularities in the purchase of provisions and valuable articles, P.W.39 Dixitkumar Dave- owner of grocery shop- has not supported the said allegations.

(iv) It has been further argued by Mr. Thakkar that so far as accused No.3 is concerned, it is the prosecution case that he kidnapped the deceased from Vadtal Temple on afternoon of 3.05.1998 and he was seen leaving the temple by witness P.W. 15 Nazirmiya (exh.152). Prosecution has examined said witness P.W.15 Nazirmiya who has not supported the prosecution case and was declared hostile. However, prosecution has relied on some part of his evidence which according to the prosecution supports its case. According to this witness, he came on duty at 2.00 O'clock in the afternoon of 3.05.1998 and opened the main gate of temple and then left the main gate to sit on otla along with one Chiman and Ganda and after he reached the otla between 2.15 to 2.30 p.m., Chiman and Ganda one after another went to the room of the deceased for massaging the feet of the deceased. Thus, from the evidence of this witness, after he left the gate of the temple and till the time he was sitting on the otla opposite the room of the deceased, deceased Gadadharanandji was very much in the room and, therefore, the question of

this witness P.W.15 Nazirmiya having any opportunity while he went at the gate to see Gadadharanandji leaving with accused No.3. Further, this witness had said in the cross-examination that he had only seen one Maruti car going out on that day, but he assertively said that deceased was not in the said Maruti car.

(v) Admission of P.W. 15 Nizirmiya that he has not stated in his statement before CID, crimes that he had seen deceased Gadadharanandji going out in the car of accused No.3 Madhavprasad with that accused. Even in his deposition before the Court, he has not stated specifically as to the date and time when he had seen the deceased going in the company of accused No.3, boarding car or leaving the temple in the said car. The trial Judge ought not to have believed any part of the deposition of P.W.15 Naizrmiya . His version is self-contradictory inasmuch as in examination-in-chief and answers given by him during the course of cross-examination by ld. Spl.PP, his say is not consistent It is stated that he opened the gate on the day in question

at about 2.00 O'clock and thereafter went to sit on the “otla” along with P.W.16 Chimanbhai and he has no idea as to what had happened thereafter. He expressed his ignorance about the presence of blue colour car belonging to accused No.3 Madhavprasad being parked on the same day in the temple. Only after he being declared hostile, in para-2 of his deposition, he has stated that he had seen the deceased sitting in blue colour car and he had also seen that car going out. He has stated in his cross-examination that he had seen only one white maruti car going outside the temple. He knows the deceased and the deceased was not in the said car. No other car had gone out while he was on gate. According to this witness, the said white colour maruti car was being driven by some unknown person and one Sadhu was sitting in that car. When the version of P.W.15 Nazirmiya does not get support from any other witness, he ought not to have been believed at all. Such a self-contradictory version or any part of that version should not be given any weightage. When the disciple of the deceased Gadadharanandji

namely P.W.3 Jatin Bhagat has said specifically (in paras 6 & 8 of his deposition at Exh.101) that when he found the room of the deceased locked from outside, he had asked the persons who were there if anybody had seen his Guru? Undisputedly, as per the case of the prosecution, when P.W.16 Chiman and P.W.15 Nazirmiya both were there and P.W.3 Jatin Bhagat had also asked everybody to ascertain the presence of his Guru, all of them had said that they had no knowledge. Considering the answers given by P.W.3 Jatin Bhagat, there is no scope to accept the version of P.W.15 Nazirmiya with regard to leaving of Guru Gadadharanandji on 03.05.1998 any time between about 2.00 & 2.30 noon. When two witnesses viz. P.W.11 Laxmiprasad (exh.140) and P.W.35 Premvatinand (exh.207) have said that all the accused including accused No.3 Madhavprasad were in Vadtal Temple althroughout on 03.05.1998, the say of P.W.15 Nazirmiya should not be accepted. It is in evidence that Accused No.3 Madhavprasad and Accused No.5 Vijay Bhagat were in temple and all the accused were in temple in the night of 03.05.1998. The

involvement of Accused No.3 Madhavprasad by P.W.15 Nazirmiya should be viewed with doubt. It appears that he has stated so under some pressure. As per the deposition of P.W.17 Jayantibhai Patel (Exh.154), Accused No.2 Shrijicharan and Accused No.5 were in Vadtal from 2.30 p.m. To 3.45 p.m. and P.W.3 Jatin Bhagat and P.W.33 Kinjal Joshi said that they left Vadtal temple with Accused No.2 Shrijicharan so as to attend secrad thread ceremony (janoi) of son of P.W.36 Durgeshbhai Bhatt (exh.210). It is also not clear from the evidence of P.W.15 Nazirmiya that from where he had seen the deceased sitting-boarding blue colour car. It is not possible to believe that deceased Gadadharanandji could have boarded the car at the gate which is far away from his room looking to his age and physical infirmities. According to Nazirmiya, after leaving the gate, he had gone to otla to sit there with Chiman and at that very point of time, Guruji was very much there in the room. P.W.16 Chiman and one Gandabhai, one after the other, went inside the room for seva of Guruji by messaging his feet.

Thus, even if Nazirmiya had seen the deceased boarding the blue colour car of accused No.3 Madhavprasad, at that time, he must be on otla which is on the opposite side of Guruji's room. P.W.16 Chiman has not stated conveniently that Nazirmiya had come and sat on otla on 03.05.1998 at any time. According to Chiman, he and Gandabhai alone were sitting on otla. The presence of Nazirmiya on otla is found doubtful and there is no corroboration qua the presence of P.W.15 Nazirmiya on the otla situated opposite the room of Guruji. When Nazirmiya has not whole-heartedly stated that when he was sitting on otla, he had seen blue colour maruti car of Madhavprasad having been parked there, why other part of his version that has come on record during the cross-examination by Spl.PP should be believed, is the question posed before the Court.

(vi) The prosecution has also placed reliance on the evidence of P.W.16 Chimanbhai to show the presence of accused No.3 Madhavprasad in the afternoon of 03.05.1998 in Vadtal Temple and

also to prove that he was present along with his blue colour car, as it was parked in the parking area of the temple. No reliance could have been placed on any part of the evidence of P.W.16 Chimanbhai because he has not stated about the presence of blue colour maruti car having parked on 03.05.1998 before Chaklashi Police when Chaklashi police was inquiring about missing Guru Gadadharanandji after 05.05.1998. This Chimanbhai had also failed in Lie Detector Test. He was arrested and was taken on remand for custodial interrogation. He was kept in custody for a very long period. It appears that under tremendous pressure of investigating agency, he has tried to support the basic story of the prosecution in half-hearted manner. His son Hashmukh was also arrested. P.W.16 Chimanbhai has admitted in his deposition about his arrest etc. and he has also admitted that he has not stated before Chaklashi Police about the blue colour car of Madhavprasad at temple. The ld. Trial Judge, according to Mr. Thakkar, has given unnecessary weightage to the evidence of these two witnesses and deposition of these two

witnesses is not capable of passing tough test of close scrutiny.

(vii) The panchanama drawn by CBI at the instance of Accused No.3 Madhavprasad under section 27 of the Indian Evidence Act should not be believed, is one of the main argument of ld. Sr.Counsel Mr. Thakkar. We have been provided main grounds-reasons for not accepting the evidence led by prosecution in the form of discovery panchanama under section 27 of the Indian Evidence Act and these grounds are:-

(i)Sec.27 panchanama is full of inadmissible evidence.

(ii)Sec.27 panchanama of Madhavprasad is 3 in number. All the three panchanamas were sought to be proved through panch Gautam, who is not only selected witness, but he is the witness who admits to pendency of criminal case filed by the accused No.2 against him and Sarpanch Ramanbhai in which they were arrested and were released on bail

subject to condition of not entering the limits of Vadtal.

Thus, there was a clear hostility between the panch Gautam through whom all the three panchanamas are sought to be proved before the Court.

(iii)This panch was selected panch in as much as willingness to disclose the place where dead body was thrown was shown by the accused No.3 during his interrogation at CBI Head Quarter in Bombay while accused No.3 was on police remand. The police therefore started from Bombay with the knowledge that they were going to Rajasthan. It was therefore expected that before they start for discovery of the place where the dead body is thrown by the accused from Bombay, they should have called panchas at Bombay, made the first part of panchanama at Bombay before actually beginning the journey for discovery of the dead body at Rajasthan.

The investigating agency chooses to

commence its journey for discovery of dead body and reached half way to Nadiad on their way from Bombay to Rajasthan and chooses to send one of their assistant to Vadtal and meet Sarpanch Ramanbhai who is admittedly co-accused with Gautam, and Ramanbhai puts the investigating agency into touch with Gautam who admittedly is having hostile relationships with accused.

It is too much of a co-incidence that in most of the panchanama made by the investigating authority, they have either used Gautam or they have used Ramanbhai perhaps to make sure that they depose on the dictates of the investigating agency. The admitted position is that both of them were hostile to the accused and could not neutrally record as things happened and could not be relied upon for any purpose much less for such a vital and important circumstance as discovery

panchanama u/s 27 which the prosecution heavily relies upon to prove an important link in the chain of events.

It was suggested in his deposition by IO Mr. Krishikar at page 1498 that for reaching Vadtal from Nadiad, while selecting panch, they had to cross three towns ie. Narsunda, Rajnagar and Mujpura, which was answered by pleading ignorance.

(iv)The place where dead body was found was already discovered and was matter of public knowledge inasmuch as the villagers who discovered the dead body and complainant Shankar Damor who was first to see the body, then inviting attention of all the leaders of village who in a group went to Bichchuwada Police Station and lodged information about find of dead body at the place in question and thereafter, inquest panchanama was made at the place where body was found and thereafter, video cassette was also

taken of the place in question and post mortem of the dead body was performed at the spot and thereafter, the dead body was cremated.

Moreover, the information about find of dead body was sent through out the State of Rajasthan as also to all the police stations in the country and to the National Agency like CBI. Therefore, it is not unreasonable to expect CBI to look for any information of find of an unknown body when they were entrusted investigation of a missing person who was suspected to have been killed, especially when a long period had elapsed between the entrustment of investigation to CBI (October 1998) to the date on which sec.27 panchanama was made i.e. 02.04.1999.

(v) Panch Gautam admits in his deposition at page 1013 in para 1 r/w para 19 at page 1021 (3rd line from top) that he was first informed by the officers of

CBI that they have to go to Rajasthan for making panchanama. So, the information as to the place where the dead body was found was not only known to number of people in Rajasthan but was a matter of record with the Rajasthan police and the same was also within the knowledge of CBI officers as deposed by the panch witness in para 1 r/w para 19 of his deposition. Therefore, there is no satisfactory evidence that the information had come from the exclusive knowledge of accused No.3.

(vi)If one looks at the first panchanama, it would become clear that because of darkness, precise place where the dead body was thrown and burnt could not be disclosed (See page 1026 last 3 lines) and it was the villager who showed the willingness upon inquiry to show the spot where the dead body was thrown by somebody and informed that it was within the limits of Barothi under

Bichchuwada Police Station as can be seen from the first three lines of page 1027. The contents of first panchanama discloses that panch party first reached Bichchuwada Police Station and after going to Bichchuwada Police Station, they were taken to the spot where the dead body was found as can be seen from the first panchanama (1022 at page 1025- 2nd para from top).

(vii)It is admitted by the investigating officer Mr. Krishikar in his deposition at page 1489- Para 24 (last line on page 1489) that the first panchanama was drawn in presence of an officer from Bicchiwada Police Station. The accused on being asked confronted that the first panchanama in question (exh.145- page 253) has stated that accused No.3 was first taken to Bichchuwada Police Station before drawing the first panchanama.

(viii) It is submitted that the second part of

panchanama should not be believed apart from the arguments advanced for not accepting the evidence of first part of the panchanama, on the ground that this Court and the Apex Court in enumber of cases, have not accepted the second part of panchanama when first part of panchanama is found untrustworthy. None the less, the Investigating Officer has not selected the panchas of the area in which the second part of the panchanama has been drawn. The people of Bichchhuwada area have not been selected. Panch Gautam, a selected panch, makes second part of panchanama. Third party of very panchanama on the very ground should be treated as unbelievable and un-acceptable evidence and not as trustworthy piece of evidence. The prosecution has not cared to prove the video tape allegedly recorded by P.W. 29 Vasant (Ex.177) and no part of the video tape could be seen and considered by the Court as the tape has not been admitted or received in evidence. This vital document in the form of video tape is not an exhibited document and the court can not consider legally to appreciate the second and

third part of the panchanama. When asked by the Court, ld. Sr.Counsel Mr. Thakkar has vehemently opposed that though the tape prepared and tendered by P.W.29 Vasant is lying as muddamal article, the Court even can not see anything by playing it with the help of Video Player (VCP) because, it would amount to reading of an unexhibited document. P.W.29 Vasant, in his deposition at Exh.177, has specifically said that he identified the cassette given by him to police, but unless that video tape is displayed (screened), it would not be possible for him to say positively that the cassette shown to him from muddamal articles is of the videography made by him at the instance and call by Bichchuwada police.

(ix) According to ld. Sr.Counsel Mr. Thakkar, the prosecution has not even proved satisfactorily, beyond all reasonable doubt that the dead body recovered by Bichchuwada Police of State of Rajasthan on 04.05.1998 was of deceased Gadadharanandji. The prosecution has tried to link the dead body and the fact of missing Guru

on three grounds:-

(1)finding of keys of lock that was put on the room of deceased Gadadharanandji and the lock found on 03.05.1998 applied on the room of deceased from the place where burnt and unidentified body was lying in the area of Bichchuwada Police Station and in the sim of village Barothi;

(2)golden teeth collected by the doctor who had performed autopsy of the dead body on the spot where the dead body was lying at Barothi and the denture treatment given by one P.W.1 Dr. Upen Harivadan Diwanji (exh.94);

(3)DNA test performed by the expert on the sample forwarded for analysis collected by Bichchuwada Police and the blood drawn from the body of one Radiyatba- real sister of the deceased, as alleged by the prosecution.

None of these three evidence are found,

according to ld. Sr.Counsel Mr. Thakkar sufficient to establish fully the say of the prosecution for certain reasons.

(11) We would like to summarize the detailed arguments advanced by ld. Sr.Counsel Mr. Thakkar on this point, in following parts:-

PART: I

That the key found on the dead body alleged to be a China made lock of the company named “Tri Circle China”. However, it is not the case of the prosecution that there was something unique about this key and exclusively used by the deceased and that no other person could be using a similar kind of lock and key and thereby failed to establish beyond doubt that the finding of the key connects the dead body with deceased. That such type of locks and keys of China-made are available in the open market. This by itself, is not a circumstance to establish that the key allegedly found at Bichchuwada Police Station establishes the

identity beyond the reasonable doubt. It was also not the case of the prosecution that two different locks made by company Tri Circle China, can not be opened by the key of other lock and failed to establish that the key of one lock made by Tri Circle China company can not open any other lock of the same company. At the most, expert's opinion on comparison of the key can establish two facts viz. (i) the key found on the person of the dead body could open lock which was allegedly used by deceased Gadadharanandji for his room and (ii) the key was similar in shape and size. Expert's opinion was of no use as it failed to establish any significant factor for the purpose of identity more particularly when there is no expert's opinion on the comparison of the metal components since the machine for the said purpose was not in working condition. It is clear from the correspondence of CBI that what is sent by them to expert for opinion was key found on the body of the deceased with a pair of key bearing Mark Tri-Circle China" on the one side and mark "00" on the other side and not

of mark “000”. As per the deposition of P.W.3 Jatin Bhagat, Gadadharanandji used to apply a lock on his room and 3 persons had one key each for the said room viz. (a) the deceased himself, (b) P.W.3 Jatin Bhagat and (c) P.W. Kinjal Joshi. However, many more keys were found from the possession of the prosecution and especially two keys were recovered from P.W.3 Jatin and two keys were recovered from the dead body as deposed by I.O. Krishikar and supported by panch Gautam. Two keys were recovered as Article 6 and one key was recovered from Kinjal Joshi. Thus, though Bichchuwada Police had recovered only one key from the dead body at the time when IO Shri Krishikar collected the muddamal articles from Bichchuwada Police Station, the number of key became two . It has not been explained by the prosecution as to how this has happened leaving a room of doubt that the second key is one of those keys recovered from Jatin Bhagat or Kinjal Joshi and planted by the IO or amongst the keys allegedly recovered from the dead body by Bichchuwada Police Station to provide a connecting link for establishing the

identity of the dead body found at Bichchhuwada.

PART : II

That the prosecution has placed reliance on the denture of deceased Gadadharanandji for establishing the identity of the dead body as that of deceased Gadadharanandji. The prosecution, however, has failed to establish the same beyond doubt. Firstly the prosecution has failed to lead cogent evidence to show what was the position of the denture of deceased Gadadharanandji. The prosecution has examined only one witness in this regard with P.W.1 Dr. Diwanji (Exh.94) who has stated that he has not examined any person named Gadadharanandji, but has examined one patient named Gajanand. He admits that from the case papers of Gajanand it reveals that he was examined on 18.05.1993 for first molar by taking two teeth adjacent i.e. teeth No.5 & 3 and a golden cap was affixed on the first pre-molar (teeth No.4) on the right hand side on 25.05.1993. As against that,

denture condition of the deceased showed that he had 3 golden caps and that too on teeth Nos.6,5 and 4. It is submitted that said doctor has identified the deceased Gadadharanandji to be the same person as one of the 24000 patients that he has treated since last six years. If the evidence of Dr. Diwanji is believed, then it reveals that deceased Gadadharanandji had only one golden cap on the first pre-molar on the right hand side (teeth No.4), whereas the dead body which was found at Bichchuwada Police Station had 3 gold teeth, completely ruling out any connection between the dead body found and the deceased Gadadharanandji. Thus, the evidence of doctor completely rules out any connection between the two i.e. between the dead body found and deceased Gadadharanandji.

PART : III

The prosecution has relied upon DNA test for establishing the dead body to be of deceased Gadadharanandji. However, the same has not been established beyond doubt. The prosecution has failed to show that remnant of the dead body found at Bichchuwada were reserved in the ice

box in a jar added with preservative “EDTA” which is the only preservative useful for preserving DNA, and also to show that these remnants of the parts of the dead body were put in any identifiable and comparable sealed bottle. No material is also produced to show that when Dr. Rao received these remnants which were seized from Bichchuwada Police station, they were sealed bearing same seal and thus were not tampered with. That the sample of blood collected from Radiyatba by Dr. Hemantbhai Patel was collected in a phial brought by member of the Investigating Team. However, Dr. Patel admits that he had no knowledge as to whether the said phial contained any preservative or not. The prosecution has not led any evidence to show that any preservative viz EDTA was added in the blood sample taken so as to keep the sample fit for comparison and that said phial was immediately put in a ice box. As admitted by Dr. Rao, unless the blood is preserved in a phial containing the preservative and stored in an ice box within half an hour of its collection, it would not be fit for comparison. The prosecution

has failed to prove beyond reasonable doubt that the sample was received by Dr. Rao with the personal seal affixed by Dr. Patel being intact. Even Investigating Officer admitted in his deposition that he did not inquire whether any of the other relative of Radiyatba was the same and has thus, failed to reach out the possibility of dead body being any other biologically related person to Radiyatba

Thus, according to ld. Sr.Counsel Mr.Thakkar, the comparison of DNA does not establish beyond reasonable doubt that the dead body found at Bichchuwada was that of the deceased Gadadharanandji. According to Mr. Thakkar, DNA Fingerprinting Test is said to be a science of near perfection and it is the duty of the prosecution to establish beyond reasonable doubt that considering the facts of the present case, prosecution when has not proved that the dead body found by the Bichchuwada police was of Guru Gadadharanandji, no weightage should be given to the evidence of expert and finding recorded after performing DNA Fingerprinting.

(12) One more failure, according to Mr. Thakkar, for prosecution is that it has failed to establish beyond doubt that the death of a person found firstly by P.W.50 Shankar Damor and thereafter by Bichchuwada police, was a homicidal death. The doctor who performed post mortem notes i.e. P.W.57 Dr. Rajkumar Gupta (exh.268) has opined that the death of the deceased was due to asphyxia due to strangulation and for forming this opinion, he has observed and stated that symptoms were there on the dead body to record such finding. Mr. Thakkar, referring to the cross-examination of this witness and confrontation done by the ld. Counsel appearing for the accused by showing the book (Modi's Medical Jurisprudence, 23rd Edition P.267), has argued that the opinion of the doctor is contrary to the expert's opinion. At the time of autopsy, the right chambers of heart were empty, but left chambers were found with clotted blood. According to Dr. Gupta, as the right chambers were empty and left were found with clotted blood, was also one of the

important circumstance to show that the deceased might have been done o death by axpysia on account of strangulation. We would like to mention different aspects considered by Dr. Gupta for forming the opinion. These aspects are part:II, III and IV of post-mortem notes (Exh.269 P.1368):-

PART : II OF P.M.NOTES: CRANIUIM AND SPINAL CORD :

Note : The Spinal Canal need not be examined unless any indication of disease or injury exists.

1. Scalp, skull and vertebrae. Scalp complete incinerated on opening skull there is extra dural haemorrhage which is sift Friable and chocolate clots.	2. Membearances congested.	3. Brain and spinal cord. Congested, Spinal Cord not opened.

PART : III OF P.M.NOTES : THORAX

1. Walls, Ribs and cartilages	All incinerated from front.
2. Pleurae	Not identified
3. Larynx and Tracheae	Congested & Black

1. Walls, Ribs and cartilages	All incinerated from front.
4. Right Lung	Half incinerated half congested with chocolate brown clots.
5. Left Lung	Incinerated
6. Pericardium	Healthy
7. Heart	Healthy, Right chamber empty, Left full of clotted blood.
8. Large Vessel	Congest.

PART : IV OF P.M.NOTES: ABDOMEN

1. Walls	Burn, incinerate.
2. Peritoneum	Incinerated.
3. Mouth pharynx and Oesophagus	Incinerated,Oesophagus congested.
4. Stomach and its contents	Foot not seen, burn with digested food material.
5. Small intestines and their contents	Bum
6. Large intestines and their contents	Burn half intact,half not seen
7. Liver	Black & stormy hard
8. Spleen	Black & stormy hard.
9. Kidneys	Congested.
10. Bladder	Incinerated,not seen.
11. Organs generation	External and internal :- Not seen except 1 ½ " pubis vessel with incinerated. Body badly incinerated. Length of Body- about 71"-18 cms. Pelvis size 28" Foot 25 cm shoes size

1. Walls	Burn, incinerate.
	possibility 9 No.

According to Mr. Thakkar, this witness has not answered correctly because as per the medical jurisprudence when a person dies because of strangulation, his right chambers of heart would be full of blood and left chambers would be empty. Dr. Gupta has admitted this position. However, he has tried to explain showing some peculiar situation and he has said that when strangulation of the neck has been done more than once and in between pressure has become less, then it is possible that the right chambers of the heart would be empty and left chambers of the heart would be full of blood. According to Mr. Thakkar, he has accepted that the opinion expressed by him as to the particular agency has not been referred to in the medical jurisprudence. So, the say of Dr. Gupta on this point be treated ipsi dixit is the submission of Mr. Thakkar. The doctor has admitted that fracture of hyoid bone is possible because of various other reasons and not only because of strangulation. So, the medical

evidence is insufficient and inadequate to establish homicidal death. This weakness in the case of the prosecution goes to the root of the most vital charge of murder.

(13) One more point pressed into service by Mr. Thakkar is that the investigation carried out by CBI is dishonest and unfair investigation and this affects adversely to the case of prosecution. While developing this point, Mr. Thakkar has pointed out certain specific aspects from the evidence and procedure adopted by CBI in filing final report against the present accused;-

(i) without any convincing reasons and/or explanation, the CBI has replaced a new set of accused than the accused shown in the FIR registered by CBI. This substitution may be because of certain strange reasons. No details have been given by CBI for substitution of some of the accused and dropping of all the persons who were undisputedly inimical to the deceased

Gadadharanandji including Nautam Swami;

(ii)Lie Detection Test carried out by the FSL Expert is very well available on record and it was handed over to the CBI also when it took over investigation. A set of accused who have failed to Lie Detection Test, have been dropped by CBI and the persons who have cleared the very test have been arraigned as accused. One of the person suspect had not even cared to appear in the Lie Detection Test. The conduct of this accused namely Premswarup Swami is a guilty conduct and by showing a false cause, he had left the State of Gujarat and thereafter he was never taken for such or similar test. Normally, the person who fails in Lie Detection Test and was inimical to deceased, ought to have been arraigned as an accused and chargesheeted and no explanation for this surprising outcome is coming forth from investigating agency. Non-implication of the important accused persons is colourable from record of investigation itself.

(iii)That the investigating officer has recorded duplicate statements. In support of this argument, ld. Counsel Mr. Thakkar has taken us through the relevant part of the deposition of IO P.W.64 Mr. Krishikar (exh.292 para-22). He has submitted that witness Raman Dahyabhai Parmar gave only one statement on 13.12.1998 and no other statement of this witness Ramanbhai has been recorded. However, IO has denied when asked that he had recorded two statements of witness Ramanbhai showing the same date i.e. 13.12.1998 with different contents. He was confronted by showing two statements of same date. He has tried to explain as to how and why one contradictory situation has cropped up. According to Mr. Thakkar, the explanation that has come on record is not at all satisfactory. There could not be two original signatures on both these statements recorded by IO Mr. Krishikar and so IO Mr. Krishikar had conveniently recorded two statements with different contents of the same witness signed by IO

himself so that he can make use of any one of those two statements. According to Mr. Thakkar, zerox copy of the statement shown to the witness by defence counsel appearing for accused No.1 Narayan Shastri was supplied to one of the accused along with sets of documents supplied with chargesheet papers. The word “swayam” is missing in the statement mark “A” and the name of person allegedly occupying the adjacent seat to the seat of deceased Gadadharanandji is mentioned as Ghanshyam Bhandari in the second statement i.e. Mark “B” instead of name Shrijicharan Swami mentioned in Statement Mark “A”. So, according to Mr. Thakkar, the word “swayam” as well as substitution of the name of the accused Ghanshyam Bhandari in the statement mark “B” gives a clear impression that the IO has not acted fairly. The case of the prosecution as well as of P.W. Jatin Bhagat and P.W. Kinjal is that Shrijicharan Swami has accompanied them on 03.05.1998 when they had gone to attend secrad thread

ceremony (Janoi) of the son of one Durgeshbhai Bhatt at Nadiad.

(14) The very witness i.e. Investigating Officer Mr. Krishikar has admitted in para-23 in his deposition that exh.95 & 98- both the documents, are seized by him from Dr. Diwanji and they are copies of each other (purported copy of the same treatment card). By reading deposition of Dr. Diwanji, Mr. Thakkar has tried to point out that it is clear from the evidence of Dr. Diwanji that exh.98 is the zerox copy of original treatment card and exh.95 was prepared by Dr. Diwanji at the instance of CBI. Close reading of both these documents reveals difference apparent because there is substantive difference in the age of the person-patient of Dr.Diwanji and the description of the treatment given. Zerox copy of the original says that teeth Nos. 5,4 & 3 were treated, but exh.95 mentions different numbers of teeth i.e. teeth Nos.6,5 & 4. According to Mr. Thakkar, this has been done by CBI instead of seizing original with a view to tally the details that were available with CBI

in the form of post-mortem notes. Only to establish the link of person missing and the dead body found, this exaggeration has been made by the investigating agency and it is sufficient to infer that CBI has missed it's alleged fairness and no weightage should be given to such investigation for any purpose whatsoever.

(15) According to Mr. Thakkar, the panchas have also not been selected objectively and on the contrary, the persons who are inimical to some of the accused persons were called to become panch witness in vital panchanamas drawn under section 27 of the Indian Evidence Act. It was possible for the IO Mr.Krishikar to select panchas from Bombay when they started for drawing panchanama at the instance of accused No.3 Madhavprasad and there was no reason to call for panchas from Vadtal itself. It was possible to select panchas from Nadiad and from any of the village or town that are located on the National Highway No.8. Panch Gautam who has deposed against the accused, is inimical Even

than, at the instance of Sarpanch of the village, he was selected as Panch and there is no explanation from IO Mr. Krishikar to show that why a person resident of village Vadtal was selected for the purpose. It has come on record that criminal cases have been filed against panch Gautam as well as another panch Raman. Both of them were also arrested and this fact has been admitted by panch Gautam and the chargesheet of those criminal cases are available on record. It would be difficult for any prudent man to accept that the IO was not aware about the inimical terms of these two important panch witnesses. It is submitted by Mr. Thakkar that “it is too much of a co-incident that two panchas i.e. Raman and Gautam who have been used by IO, both happened to be such persons against whom some of the accused had filed criminal prosecution and got them arrested. It is too much of a co-incidence to be innocuous.” It is the further say of Mr. Thakkar that this is a case of clear blackmailing of Bichchuwada Police Station by CBI and in particular by IO Mr. Krishikar. It is clear from

the record that SHO of Bichchuwada Police Station was aware of one fact, after receipt of post-mortem notes from the hospital-from Dr. Rajkumar Gupta, that the offence of murder has been committed within the jurisdiction of his police station. Even than, Bichchuwada police had failed registering the crime and kept the report given by P.W. Shankar Damor as a matter of inquiry under section 174 of CrPC. Such case would not fall in the category of inquiry under section 174. So, by bringing pressure on local police, CBI collected evidence as per its convenience so that the link between the person missing namely Gadadharanandji and the dead body recovered by Bichchuwada Police can be smoothly established. Successful investigation is considered to be a matter of credit for an officer working with CBI and, therefore, even the senior officers are tempted to bring any type of pressure so the finding at the end of investigation which can look logical, can be arrived at. IO Mr. Krishikar has denied having gone to Bichchhuwada Police Station and denied the presence of Bichchhuwada Police in the

evening of the first day when they allegedly reached near the spot for the first time with accused Madhavprasad. He has also denied that Bichchhuwada Police was also present on the next day morning on which day the second panchanama was drawn. But P.W.29 Vasant- Videographer has clearly stated in para-36 of his deposition that in the morning when second panchanama was drawn, he was called by Bichchhuwada police and was introduced to CBI Officer who had accompanied to the scene of incide There was no reason for Mr. Krishikar to deny this fact. It appears that the IO has played a game of hide and seek looking to the date of his deposition.

(16) This is a case of criminal conspiracy based on the proposition that because of the alleged motive, conspiracy was hatched, but the prosecution has failed to prove the conspiracy. The alleged motive is not satisfactorily established and, therefore, it should be held that the prosecution has failed to prove the case as pleaded by any cogent evidence and there is no sufficient material to implicate accused

No.3 who according to the prosecution, actually carried out the plan of murder by taking Gadadharanandji out of Vadtal Temple premises. The circumstance found against the accused that he was present in the temple premises before 2.00 p.m. On 03.05.1998 or round about that time or his falsity about motor vehicle claim that has caught fire because of LPG gas leakage, are the circumstances which can not be said to be inconsistent with the innocence. In such a serious case, the prosecution is supposed to establish a clear and visible link of each circumstance so that the chain can be established. Only one missing link can destroy the case of prosecution when it is based on circumstantial evidence only. This is a case where it is doubtful to say that the IO has attempted to present truth and nothing else than the truth and that the subjective satisfaction of the IO has been fully pressed into service by the prosecuting agency. The investigation has to be carried out in a bona fide manner and the prosecution thereafter is supposed to establish the case beyond reasonable doubt. The basic

story suffers from various infirmities. No strong circumstance has emerged which can be said to be against accused and no chain is found to have been established qua each circumstance brought on record by the prosecution. A weak piece of evidence can not safely be used as corroborative piece of evidence only to add strength to the weak prosecution case and, therefore, considering the legal position settled by the Highest Court of the country, this Court should hold that the conviction recorded by the ld. Trial Judge suffers from various infirmities, error and perversity looking at the case only form one side and and, therefore, all accused should be acquitted.

Authorities cited on the law of Circumstantial Evidence can be dealt with while commenting on rival contentions raised.

(17) While placing oral submissions, Mr. Thakkar has tried to show partition qua the case placed by the prosecution against Accused Nos. 1,2, 4 & 5 on one side and against accused No.3 on the

other and while developing other angle, he has submitted to show partition between accused Nos. 1,2 and 4 on one hand and accused Nos. 3 & 5 on the other. However, the basic submission of Mr. Thakkar is that even the alleged circumstances against accused Nos. 3 & 5 being not adequate and sufficient and as they are not collectively or individually sufficient to link the accused with the crime, accused Nos. 3 & 5 also ought not to have been convicted by the trial Court. The say of the ld. Counsel appearing for the CBI, according to Mr. Thakkar, should not be accepted because certain aspects pointed out from the evidence to prove the motive is very weak and remote type of evidence. Such aspects should not be accepted as sufficient to prove the motive against the accused. There must be cogent and clinching evidence. The documentary evidence collected by CBI and produced on record to establish the huge income and/or properties of accused Nos. 1 & 2, itself is not sufficient to establish that accused Nos. 1 & 2 were buttressing their income from purchase of valuables and provision items

for temple trust. It is submitted that no pointed question has been asked to any of these two witnesses in particular with regard to the income and as the accused persons are not given an opportunity to explain availability of cash and other properties, would make the prosecution disentitled to use the same as an incriminating evidence against these two accused. Even this alleged circumstance is said to be established against accused Nos. 1 & 2 as to their huge income and properties, the same is too remote and the same is not inconsistent with their innocence. When evidence of P.W.33 Kinjal Joshi (exh.203) does not require to be accepted as sufficient evidence inspiring confidence with regard to evidence as to motive is concerned because what is deposed by him is that he had overheard telephonic talk between deceased Guruji and Acharya Maharaj Ajendraprasadji and therefore the said story requires to be held as concocted story. The CBI could have collected and produced some corroborative piece of evidence to establish the telephonic conversation between Acharya Maharaj

Ajendraprasadji and the Chairman of Board i.e. deceased Guru Gadadharanandji because as per the case of the prosecution, when this P.W. Kinjal Joshi allegedly over-heard the telephonic talk on instructions given by his Guru, Acharya Maharaj Ajendraprasadji was out of district-telephone communication circle. There is no evidence, according to Mr. Thakkar which can be said to be satisfactory in nature whereby it can be inferred that the prosecution has established the motive of a crime. The other circumstance that the deceased was last seen in the company of accused No.3 has remained unproved or not proved beyond reasonable doubt. Mr. Thakkar has placed reliance on three decision in support of his submissions:-

(i)Bakshish Singh v/s State of Punjab, 1971(3) SCC 182

(ii)Sarbir Singh v/s State of Punjab, 1993 Suppli.(3) SCC 41, and

(iii)Surinderpal Jain v/s Delhi Administration, 1993 Suppli.(3) SCC 681.

We have considered these decisions in

relevant respective paras of the judgments.

(i) According to Mr. Thakkar, all the three material witnesses namely P.W.16 Chimanbhai, P.W.15 Nazirmiya and P.W.3 Jatin Bhagat have failed to establish this aspect. It is not the say of even P.W.3 Jatin Bhagat that he had last seen the deceased with accused No.3. He had left Vadtal temple for some work when his deceased Guru was in his room. CBI relies on the evidence created during investigation against accused No.5 and especially when no independent witness has supported as to visit of deceased Guru Gadadharanandji at Navli Gurukul, evidence created by way of panchanama allegedly drawn under section 27 of the evidence Act should not be given any weightage. Substantive part of panchanama drawn allegedly at Navli Gurukul is inadmissible in evidence because the statement of living persons have been incorporated including “gesture or conduct” of the accused Vijay Bhagat. The conduct of Vijay Bhagat would not help prosecution in drawing any inference against accused No.5. The ld. Trial Judge has

based findings on certain surmises and that too based on inadmissible evidence. Evidence of P.W.49 Minaxi Patel (exh.247), P.W.43 Utsav Tanna (exh.228) and P.W.25 Rakshit Shah (exh.165) are not capable of taking case of prosecution any further. The star witness to prove Navli incident viz P.W.42 Ghanshyam Bhagat (one of the resident of Navli Gurukul and disciple- exh.227), has not supported the case of the prosecution. In the same way, evidence of P.W.32 Mafatbhai Oza (exh.200) is inadmissible. Some part of evidence of P.W. Mafatbhai even if considered, is not found useful to establish the guilt of the accused. At the most, it can be accepted that CBI officers had called Minaxi and in her presence, CBI Officers had shown photographs of deceased Guru Gadadharanandji to Minaxi. This part of evidence is useful to condemn the conduct or say of Minaxi, but it would not help the prosecution. In the same way, the print-out obtained from a Cellular Telephone Service Provider produced by the prosecution, is not sufficient to establish any element of either motive or involvement of accused No.1

and/or accused No.2 in the crime. Such evidence should not be accepted that P.W.25 Rakshit Shah had conversation with accused Shrijicharan. There may be more than one person in the family of P.W.25 Rakshit Shah having faith in Vadtal temple. No pointed question was asked to accused Shrijicharan as to the effect of the documentary evidence produced vis-a-vis oral version of P.W.25 Rakshit Shah. Mere production of telephone print out obtained from Cellular Telephone Service Provider during the deposition of P.W.48 Dhiren Jayantilal Laria (exh.239), would not make the prosecution entitled to use this part of evidence as incriminating against the accused and the same would not add any strength to the story placed by the prosecution. The prosecution has failed to prove that vehicle for which a claim on account of damage caused because of fire was made, was of the ownership of accused No.5. On the contrary, the real owner of the said vehicle has claimed ownership i.e. P.W. Laxmiprasad and, therefore, any wrong to get the claim from the Insurance Company is found to have been committed, then only

Laxmiprasad is responsible for that for placing false claim and signing the claim form by accused No.5 would not make him liable to the extent of his involvement in a grave offence of murder of deceased Gadadharanandji. On the contrary, it appears from record that CBI was aware from the beginning that a dead body was found at village Barothi of Tehsil Bichchuwada because Bichchuwada police has informed all the concerned police stations and higher-ups in the State of Rajasthan. Rajasthan, undisputedly, is under CBI, Mumbai and so the area of investigation of CBI, Mumbai extends even in the State of Rajasthan. So, the CBI appears to have linked the fact of missing of Guru Gadadharanandji with the recovery of a burnt dead body by Bichchuwada police by creating evidence with the help of panchas arranged from town Vadtal itself i.e. panch P.W.40 Gautam. It is in the evidence of police officer of Bichchuwada Police Station examined by the prosecution who has said that Bichchuwada police was present at the time of one panchanama prepared on 02.04.1999. Considering the legal

position as to evidence produced in the nature of panchanama under section 27 of the Evidence Act i.e. discovery panchanama, the entire panchanama should be rejected as there is no element of discovery of fact or place. When the investigating agency was aware about the place and the fact from the beginning, nothing can be said to have been discovered at the instance of accused No.3. Mr. Thakkar has taken us through about 9 decisions, six of them are of the Apex Court and one is of Privy Council i.e. **Pulukuri Kottaya and others v/s Emperor, AIR 1947 Privy Council 67** (Para-10). It has been observed in para-10 as under:-

> Sec.27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police Officer must be deposed to, and thereupon so much of

the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in police custody produced from some place of concealment some object, such as a dead body, a weapon, or ornaments, said tobe connected with the crime of which the informant is accused. Mr. Megew, for the crown,has argued that in such a case, the “fact discovered” is the physical object produced, and that any information which relates distinctly to that object can be proved. Upon this view information given by a person that the body produced is that of a person murdered by him, that the weapon produced is the one used by him in the commission of a murder, or that the ornaments produced were stolen in a decoity

would all be admissible. If this be the effect of section 27, little substance would remain in the ban imposed by the two preceding sections on confession made to the police, or by persons in police custody. That ban was presumably inspired by the fear of the Legislature that a person under police influence might be induced t confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. On normal principles of construction their Lordships think that the proviso to S.26, added by S.27, should not be held nullify the substance of the section. In their Lordship's view, it is fallacious to treat the “fact discovered “ within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact.

> Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that “I will produce a knife concealed in the roof of my house” does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, th fact discovered is very relevant. But if to the statement the words be added“ with which I stabbed A”, these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.”

We shall discuss the ratio of all these decisions and the observations made by the Apex Court while dealing with legal aspects placed before us during the course of oral submissions by ld. Counsel appearing for the parties to avoid repetition.

(18) According to Mr. Thakkar, there is no

evidence which can be said to be sufficient or convincing in nature to accept the say of the prosecution that accused No.3 had burnt the car in question after initiation of the investigation because of the complaint filed on 05.05.1998 about missing of Guru Gadadharanandji. There is conflict in evidence as to dashing of the car with tree. P.W.13 Mahommad Nazim Shaikh has clearly deposed that the car laying in his guarage is grossly damaged car. He has described various portions of the car which were found damaged when it was brought before him. The presence of inflammable material found in the car should not be given any weightage because the workers/mechanics of his guarage put such material that is being used for cleaning spare-parts etc. of the vehicles that are coming to guarage for repairs. Video recording made at Navli Gurukul and the evidence of P.W.19 Jagdish Soni (Exh.158) is not sufficient to link accused No.5 with the crime or alleged incident that had occurred in the evening of 03.05.1998 i.e. murder of Guru Gadadharanandji after his arrival at Navli

Gurukul under the enticement of enjoyment of sex with a young lady- according to prosecution P.W. Minaxi. While commenting on the evidence of each witness relied upon and examined by the prosecution, Mr. Thakkar has placed reliance on two decisions of the Apex Court on the point of reliability of witnesses; viz **(i) State of Haryana v/s Ram Singh, 2002(2) SCC 426 (Paras 13 & 19) (= AIR 2002 SC 620), and (ii) State of Haryana v/s Jagbir Singh & Another, (2003)11 SCC 261 (Para-21).** In the case of *Haryana v/s Ram Singh (supra),* the Apex Court has observed in paras 13 & 19 thus:-

> 13. The judgment under appeal admittedly does not contain a whisper even pertaining to the contradictions between eye-witnesses' account and the medical evidence. In the contextual facts and as noticed above, medical evidence runs positively counter to the eye-witnesses' account rendering the ocular testimony not being dependable or trustworthy. There is no credible evidence on record. It is significant that all the

so-called eye-witnesses were produced in Court by the police from its custody in handcuff condition and it is only on the witness box that the handcuffs were released and taken up from the body of the person. All of them are under-trial prisoners being involved in a murder trial. The Court thus has to scrutinize its evidence with a little bit of caution and scrutiny so as to judge their veracity. Admittedly all the supposed eye-witnesses are relations of the deceased. As such they fall within a category of interested witnesses. It is not the evidence ought to be discredited by reason of the witness being simply an interested witness but in that event the Court will be rather strict in its scrutiny as to the acceptability of such an evidence. High Court has principally relied on the 161 statements and the contradictions available on the record have not been taken note of. In our view this is a clear error on the part of the High Court. Some weapons have been seized along with the cartridges and it

has been stated that such recovery was effected in terms of the disclosure statement. Before this Court it has been strongly urged that the same is in contravention of Section 27 of the Evidence Act. Undoubtedly, Section 27, though provides an exception, but the Court should always be vigilant about the circumvention of its provision - "Sarkar on Evidence (15th Edition)" has the following to state on Section 27 :-

> "..... The protection afforded by the wholesome provisions of Ss. 25 and 26 is sought to be whittled down by the police by their ingenuity in manipulating the record of the information given by the accused in the case-diary in such a manner as to make it appear that it led to the discovery of some facts although the police might have made such discovery from other sources. When a fact is once discovered from information received from another

source, there can be no discovery again even if any information relating thereto is subsequently extracted from the accused. A devise sometimes adopted by the police is to stage a scene and take the accused to the place where the things discovered lay buried or hidden and require him to make a search for them at the spot indicated to the accused, or sometimes the articles are first produced before the accused and thereafter statements purporting to have been made by him about the so-called discovery are recorded. Court should be watchful that the protection afforded by Ss. 25 and 26 should not be dependent on the ingenuity of the police officer in composing the narrative conveying the information relating to the alleged recovery of a fact."

19. Significantly all disclosures, discoveries and even arrests have been made

in the presence of three specific persons, namely, Budh Ram, Dholu Ram and Atma Ram - no independent witness could be found in the aforesaid context - is it deliberate or is it sheer coincidence - this is where the relevance of the passage from Sarkar on Evidence comes on. The ingenuity devised by the prosecutor knew no bounds - Can it be attributed to be sheer coincidence? Without any further consideration of the matter, one thing can be more or less with certain amount of conclusiveness be stated that these at least create a doubt or suspicion as to whether the same has been tailor-made or not and in the event of there being such a doubt, the benefit must and ought to be transposed to the accused persons. The trial Court addressed itself on scrutiny of evidence and came to a conclusion that the evidence available on record is trustworthy but the High Court acquitted one of the accused persons on the basis of some discrepancy between the oral testimony and the documentary evidence as noticed fully

herein before. The oral testimony thus stands tainted with suspicion. If that be the case, then there is no other evidence apart from the omni present Budh Ram and Dholu Ram, who however are totally interested witnesses. While it is true that legitimacy of interested witnesses cannot be discredited in any way nor termed to be a suspect witness but the evidence before being ascribed to be trustworthy or being capable of creating confidence, the Court has to be consider the same upon proper scrutiny. In our view, the High Court was wholly in error in not considering the evidence available on record in its proper perspective. The other aspect of the matter is in regard to the defence contention that Manphool was missing from village for about 2/3 days and is murdered on 21-1-1992 itself. There is defence evidence on record by DW-3 Raja Ram that Manphool was murdered on 21-1-1992. The High Court rejected the defence contention by reason of the fact that it was not suggested to Budh Ram or

Dholu Ram that the murder had taken place on 21-1-1992 itself and DW-3 Raja Ram had even come to attend the condolence and it is by reason therefor Raja Ram's evidence was not accepted. Incidentally be it noted that the evidence tendered by defence witnesses cannot always be termed to be a tainted one - the defence witnesses are entitled to equal treatment and equal respect as that of the prosecution. The issue of credibility and the trustworthiness ought also to be attributed to the defence witnesses at par with that of the prosecution. Rejection of the defence case on the basis of the evidence tendered by defence witness has been effected rather casually by the High Court. Suggestion was there to the prosecution's witnesses in particular PW-10 Dholu Ram that his father Manphool was missing for about 2/3 days prior to the day of the occurrence itself - what more is expected of the defence case : a doubt or a certainty - jurisprudentially a doubt would be enough : when such a suggestion has been

made prosecution has to bring on record the availability of the deceased during those 2/3 days with some independent evidence. Rejection of the defence case only by reason thereof is far too strict and rigid a requirement for the defence to meet - it is prosecutor's duty to prove beyond all reasonable doubts and not the defence to prove its innocence - this itself is a circumstance, which cannot but be termed to be suspicious in nature.

The Apex Court, in the case of ***State of Haryana v/s Jagbir Singh (supra),*** has observed in para-21 as under:-

“16. These aspects were recently highlighted in State of Rajasthan v. Rajaram, (2003 AIR SCW 4097).

“21. What remains now to be seen is whether the recovery of the dead body from the premises of the accused establishes the prosecution version. According to the prosecution when the Panchayat gave time to the accused to produce the boy alive or

dead, he accepted that the dead body was buried in his compound. The accused dug the land and on seeing the leg of the dead body they stopped digging and went to the police. The High Court has found that the prosecution claimed that the two accused were arrested by the Sub-Inspector Mahender Singh Bhatti (PW 12) on 09.09.1995 on the culvert of Jai Canal at about 8.00 p.m. In the presence of one Chatter Singh and Om Parkash. However, Om Parkash (PW 10) has denied about the arrest of the accused by PW 12 near the canal. From the statement of P.W.12, it appears that the accused persons after their arrest made disclosure of the statement about the ransom, concealment of the dead body and the dead body recovered in the presence of the aforesaid Chatter Singh and Om Parkash (PW 10). It is belied by the statement of Om Prakash (PW 10). According to this witness, when the accused made a voluntary statement in the presence of many others he pointed out where the body was buried. They went to the police

station where they met PW 12 and told him about finding the dead body. PW 10 told him that the dead body was to be handed over to Sr.SP or the Dy.SP. Evidence of PW 10 further shows that PW 12 accompanied by another ASI and other police officials went to the village. There many people had assembled and as the villagers started shouting and agitating that led to an altercation, both the accused were arrested by the Dy.SP. Thereafter, it is stated that the accused Jagbir made a disclosure statement, where he (PW 10) and Chatter Singh were stated to be eyewitnesses. One thing is clear that there are unexplained contradictions about the place where the accused were arrested and the manner of recovery. Since the dead body was recovered on the basis of information already known, Section 27 of the evidence Act has no application. As observed by this Court in Aher Raja Khima v/s State of Saurashtra (AIR 1956 SC 217), a recovery of the incriminating articles alleged to have been

made by the accused while in custody is inadmissible in evidence if the police already knew where they were hidden. That takes the case out of the purview of Section 27 of the Evidence Act."

(19) Mr. Thakkar has placed reliance on two more decisions while responding to the arguments advanced by ld. Counsel appearing for the CBI Mr. Ravani on the point in reference to the drawing of panchanamas under section 27 of the Evidence Act- discovery panchanamas, viz ***(i) Earabhadrappa alias Krishnappa v/s State of Karnataka, (1983) 2 SCC 330 (Paras 7 & 8), (ii) Bodh Raj v/s State of J & K, (2002) 8 SCC 45 (Para-18) (= AIR 2002 SC 3164).*** We would like to refer relevant paras 7 & 8 of the decision in the case of ***Earabhadrappa alias Krishnappa (supra):-***

"7. There is no controversy that the statement made by the appellant Ex.P.35 is admissible under Section 27 of the evidence Act. Under Section 27 only so much of the information as distinctly relates to the facts really thereby discovered is

admissible. The work “fact” means some concrete or material fact to which the information directly relates. As explained by Sir John Beaumont in ***Pulukuri Kotayya v. Kind Emperor (AIR 1947 PC 67)***;

> “..... it is fallacious to treat the “fact discovered” within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact.”

8. For the applicability of Section 27 therefore two conditions are prerequisite, namely (1) the information must be such as has caused discovery of the fact; and (2) the information must “relate distinctly” to the fact discovered. In the present case, there was a suggestion during the trial that PW 26 had prior knowledge from suggesting during the trial that PW 26 had prior knowledge from other sources that the

> incriminating articles were concealed at certain other places and that the statement Ex.P.35 was prepared after the recoveries had been made and therefore there was no "fact discovered" within the meaning of Section 27 of the Evidence Act. We need not dilate on the question because there was no suggestion made to PW 26 during his cross-examination that he had known the places where the incriminating articles were kept. That being so, the statement made by the appellant Ex.P.35 is clearly admissible in evidence."

We would also like to refer to relevant part of para-18 of the decision in the case of ***Bodh Raj (supra),*** wherein the Apex Court has said that:-

> 18. Emphasis was laid as a circumstance on recovery of weapon of assault, on the basis of information given by the accused while in custody. The question is whether the evidence relating to recovery is sufficient to fasten guilt on the accused. Section 27

of the Indian Evidence Act, 1872 (in short 'the Evidence Act') is by way of proviso to Ss. 25 to 26 and a statement even by way of confession made in police custody which distinctly relates to the fact discovered is admissible in evidence against the accused. This position was succinctly dealt with by the this Court in ***Delhi Admn. v. Balakrishan (AIR 1972 SC 3) and Md. Inayatullah v. State of Maharashtra (AIR 1976 SC 483).*** The words "so much of such information" as relates distinctly to the fact thereby discovered, are very important and the whole force of the section concentrates on them. Clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. The ban as imposed by the preceding sections was presumably inspired by the fear of the Legislature that a person under police influence might be induced to confess by the exercise of undue pressure. If all that is required to lift the ban be the

inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. The object of the provision i.e. S. 27 was to provide for the admission of evidence which but for the existence of the section could not in consequences of the preceding sections, be admitted in evidence. It would appear that under S. 27 as it stands in order to render the evidence leading to discovery of any fact admissible, the information must come from any accused in custody of the police. The requirement of police custody is productive of extremely anomalous results and may lead to the exclusion of much valuable evidence in cases where a person, who is subsequently taken into custody and becomes an accused, after committing a crime meets a police officer or voluntarily goes to him or to the police station and states the circumstances of the crime which lead to

the discovery of the dead body, weapon or any other material fact, in consequence of the information thus received from him. This information which is otherwise admissible becomes inadmissible under S. 27 if the information did not come from a person in the custody of a police officer or did come from a person not in the custody of a police officer. The statement which is admissible under S. 27 is the one which is the information leading to discovery. Thus, what is admissible being the information, the same has to be proved and not the opinion formed on it by the police officer. In other words, the exact information given by the accused while in custody which led to recovery of the articles has to be proved. It is, therefore, necessary for the benefit of both the accused and prosecution that information given should be recorded and proved and if not so recorded, the exact information must be adduced through evidence. The basic idea embedded in S. 27 of the Evidence Act is the Doctrine of

confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered as a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature but if it results in discovery of a fact, it becomes a reliable information. It is now well settled that recovery of an object is not discovery of fact envisaged in the section. Decision of Privy Council in **Palukuri Kotayya v. Emperor (AIR 1947 PC 67),** is the most quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect. ***(See State of Maharashtra v. Danu Gopinath Shinde and others (2000) Cri LJ 2301)***. No doubt, the information permitted to be admitted in

evidence is confined to that portion of the information which "distinctly relates to the fact thereby discovered." But the information to get admissibility need not be so truncated as to make it insensible or incomprehensible. The extent of information admitted should be consistent with understandability. Mere statement that the accused led the police and the witnesses to the place where he had concealed the articles is not indicative of the information given.“

(20) While summing up the arguments, Mr. Thakkar has placed reliance on following four decisions of the Apex Court dealing with the cases based on circumstantial evidence:-

(i)Sarwan Singh Rattan Singh v/s State of Punjab, AIR 1957 SC 637

(ii)State of Rajasthan v/s Rajaram, (2003) 8 SCC 180 (= AIR 2003 SC 3601)

(iii)State of Haryana v/s Jagbir Singh & Another, (2003) 11 SCC 261

(iv)Narendra Singh & Anr. V/s State of M.P.,(2004) 10 SCC 699.(= AIR 2005 SC

3249)

If all the above cited decisions are read together and in reference to the context of each other, the ratio of these decisions is :-

That the prosecution in a case based on circumstantial evidence, has to establish the case substantially as pleaded. Each circumstance relied upon by the prosecution requires to be proved. Proof should be by way of legal and admissible evidence. If the circumstances are more than one, then link between these circumstances also requires to be established and that too by leading evidence. There may be some loose ends, but the establishment of the link should be of convincing nature and the Court should not jump to a favourable conclusion on account of strong suspicion and it is always risky to draw inference on the material that has been simply pleaded and placed by the prosecution , not proved to the satisfaction of the Court. In the present case, according to Mr. Thakkar, the proved circumstance also should be able to link the

accused with crime remaining consistent with guilt and should be inconsistent to once innocence. If the decision in the cases of **State of Rajasthan v/s Gopal, 1998(8) SCC 449 and the decision of Allahabad High Court in the case of Dharam Deo Yadav v/s State of U.P. in Criminal Appeal No. 1000 of 2003 decided on 3rd September, 2005 which is published on page No.834 in the Book "DNA TESTS IN CRIMINAL INVESTIGATION TRIALS & PATERNITY DISPUTES,** are concerned, the evidence of DNA fingerprinting with regard to establishing biological relationship between Radiyatba and deceased Gadadharanandji should be held to be unestablished. Missing of an important link leads to failure is the law of land, according to Mr. Thakkar. It has been observed in para-29 of the above-cited decision viz. ***Daram Deo Yadav (supra)*** as under:-

> "29. P.W.21 is Dr. G.V. Rao, Chief, DNA Fingerpringing Laboratory, CDED, Hyderabad. He has stated about his techincal and expert qualifications on the relevant subject, which, as a matter of fact, are accepted, as not

questioned or rebutted. He has stated that on September, 1998, Prashant Kumar, Sub-Inspector and Constable Kameshwar Singh Yadav, Police Station Rohania, district Vanarasi reached in the laboratory and produced the requisition from Chief Judicial Magistrate, Varanasi along with two parcels pertaining to crime No.254/98 of Police Station Bhelupur, Varanasi of which this witness along with his assistant made examination and method of examination has also been proved byi oral testimony of this scientist witness Dr.G.V.Rao, P.W.21. He has stated that he had satisfied himself regarding authenticity of seal and its intactness. He adopted the test known as Short Tandam Space Repeats (STR) analysis. He has also stated that he arrived at the conclusion after satisfying himself twice and issued the report. He has proved in detail Ext.Ka.26; the original report sent by him to the Court. He has also proved the process and other things required on the subject by his statement and has confirmed his opinion that Ext.A i.e. blod sample of Alen Jack Routley is biologically related to the sources of Ext.B and C., i.e. humerus and femur bones of deceased. He has

proved his second conclusion those sources of Exts.B and C in his report, i.e. humerus and femur bones are from one and the same source and he has thus proved the complete material along with his report submitted to the Court by his oral testimony."

The accused have also relied heavily on one recent decision of the Supreme Court in the case of **Rama Reddy Rajeshkhanna Ready v/s State of AP, (2006)2 GLH 207** where the Apex Court, on the set of facts of cited decision, has held that :-

"27. It is now well-settled that with a view to base a conviction on circumstantial evidence, the prosecution must establish all the pieces of incriminating circumstances by reliable and clinching evidence and the circumstances so proved must from such a chain of events as would permit no conclusion other than one of guilt of the accused. The circumstances cannot be on any other hypothesis. It is also well-settled that suspicion, however, grave may be, cannot be a substitute for a proof and the courts shall take utmost precaution in finding an accused

guilty only on the basis of the circumstantial evidence. ***(See: Anil Kumar Singh v. State of Bihar, (2003)9 SCC 67 and Reddy Sampath Kumar v. State of A.P., (2005)7 SCC 603).***

28. The last-seen theory, furthermore, comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. Even in such a case court should look for some corroboration.

In the cited decision, the prosecution was mainly relying on the evidence of solitary witness to prove the alleged motive and motive was, according to the prosecution, was prime to lead the accused to commit offence. So, it is argued that the ratio of this decision is applicable to the facts of the present case as the prosecution relies on solitary evidence of hostile witness to prove one fact that deceased was seen last in the company of accused No.3 Madhavprasad.

(21) Mr. YN Ravani, the ld. Counsel appearing for CBI has argued at length saying that the ultimate finding recorded by the ld. Trial Judge is the correct finding whereby the ld. Judge has held all the accused guilty of the charge saying that the prosecution has successfully brought home the charge. While placing justification, Mr Ravani pointed out certain dates which according to him are very much relevant and the evidence led by the prosecution according to him, needs appreciation in the background of the events that occurred during the course of and in commission of offence and these dates are;

(i)11.04.1998 – Deceased Gadadharanandji elected as Chairman of the Temple Board;

(ii)16.04.1998 – Deceased Gadadharanandji disclosed his mind that he is seriously thinking to change Kotharis (main administrators and a person in charge of temple under Vadtal Gadi and fixed agenda for next meeting for the purpose on 16.04.1998.

(iii)22.04.1998- Meeting of Temple Board Committee held to discuss the agenda circulated on 16.04.1998, for certain reasons, could not decide the issue of transfer/appointment of Kotharis from all the temples including the main temple at Vadtal.

(iv)03.05.1998 – Guru Gadadharanandji-the deceased found missing after 2.30 and 2.45 p.m.(about) from Vadtal temple premises and particularly from his room.

(v)04.05.1998 – One resident of village Barothi viz. P.W. Shankar Damor found a dead body in a ditch in a burnt condition and he informed to the police station officer of his tehsil i.e. Bichchhuwada and Bichchhuwada police found one half-burnt dead body.

(vi)05.05.1998 – the date on which P.W. Jatin Bhagat approached Chaklashi Police Station with an application intimating about missing of his Guru Gadadharanandji. Entry to this effect was registered on that very day by Chaklashi Police Station popularly

known as “Janvajog Entry” No.103.

(vii)Accused No.3 approached General Insurance Company saying that his vehicle is burnt on account of an accident and survey of burnt vehicle- Maruti van was done by the Survey/Investigating Officer of the Insurance Company.

(viii)08.05.1998- Investigation about missing of Guru Gadadharanandji in reference to the entry registered by Chaklashi Police came to be handed over to Nadiad Police Station.

(ix)12.05.1998 -The investigation was transferred to Local Crime Branch of District : Kheda and later on it was handed over to State Crime Branch.

(x)21.09.1998 - Criminal Misc. Application No. 3996/1998 came to be filed in the High Court of Gujarat by a disciple of Guru Gadadharanandji viz. P.W.3 Jatin Bhagat for appropriate reliefs including the relief to transfer the investigation to CBI.

(xi)05.10.1998 - High Court directed that investigation be done by CBI.

(xii)29.10.1998- CBI registered crime for

the offence punishable under section 365, 120-B of IPC (Exh.267).

(xiii)20.03.1999 - Accused No.3 Madhavprasad was arrested by CBI.

(22) The facts placed by prosecution before the trial Court along with papers of chargesheet have been placed before us by Mr. Ravani in his own way and it is not necessary to repeat as the basic facts have been stated by us in earlier part of our decision. Mr. Ravani has pointed out certain aspects. According to Mr. Ravani, certain facts require to be seen with some different angle, keeping in view the final report submitted by CBI under section 173 of CrPC. According to Mr. Ravani, a temple of Swaminarayan sect is situated at Vadtal, District: Kheda, which is under the administration of Vadtalvasi Laxminarayan Devmandir, a registered trust. The head office of the said trust is situated at village Vadtal. The scheme of the trust is framed by this Court and the book is at Exh.115. The management committee of the trust is elected and

the Chairman of the committee is appointed from the elected members. Even Secretary, Chief Kothari- Joint Secretary are also appointed. The Chief Kothari perform functions as Chief Administrator as well as Treasurer. The financial and other liabilities of purchase of provisions, articles etc. are on the Chief Kothari. Trust has power to appoint Chief Kothari from saints community and even it can transfer, suspend him. For that, the Chairman is required to issue agenda and after calling the meeting, the procedure is to be followed.

(23) It is further submitted by Mr. Ravani that on 11th April,1998, Guru Gadadharanandji was elected as Chairman of the committee uncontested. At that time, Shri Bhakti Kishoredasji was the Chief Kothari whereas Shri Narayan Shashtri was the Assistant Kothari. After taking over as Chairman, Guru Gadadharanandji issued agenda and initiated steps to transfer Kotharis on 16th April,1998. Therefore, the accused No.1 Narayan Shashtri and the accused No.2 Shrijicharan Swami got annoyed, reason for which was that in purchase of

articles and other things for the temple, huge financial benefits were got by him. In fact, the Chief Kothari Bhakti Kishoredasji was an aged and infirm person and, therefore, he was not doing any active activity and, therefore, his assistants i.e. accused Nos. 1 & 2 were getting huge financial benefits. Therefore, if their transfer is effected, they had to suffer huge loss. Hence, accused No.1 with the aid of accused Nos. 2 to 5 conspired to abduct Guru Gadadharanandji, the Chairman of the Trust, and thereafter to murder him.

(24) It is the say of CBI that accused No.3 Madhavprasad and accused No.4 Ghanshyamdas had abducted Gadadharanandji, as a part of the conspiracy by inducing to have some sexual pleasure and took him to “Sant Niwas Gurukul” situated at Navli. Village Navli is at a distance of about 10 to 12 kms. From Vadtal. Vadtal is not a big town. Accused No.2 Shrijicharan and accused No.5 Vijay Bhagat had reached there at Navli. Deceased Guru was provided with some soft-cold drink added and

mixed with sleeping pills- tranquilizer tablets. Thereafter, he was done to death by strangulation. The ornaments and other articles put on by deceased Gadadharanandji were removed and thereafter in order to dispose of and destroy the dead body of the deceased, accused Nos. 3 & 5, with the help of other accused, put the dead body in a maruti van bearing registration No. GJ-6A-1894 belonging to accused No.3. Dead body was taken out of Gurukul Navli and the same was thrown on the border of village Barothi of Ta: Bichchhuwada of State of Rajasthan. Dead body was set on fire by pouring diesel and petrol etc. and thereafter accused Nos. 3 & 5 left the place and conveniently returned to Vadtal. Intention of the accused was to destroy the evidence and with a view to destroy the evidence that might be collected in case of serious investigation, Maruti van bearing registration No. GJ-06-A-1894 wherein the dead body was taken, was attempted to set on fire and in this event, accused No.5 was active. Mr. Ravani has submitted that on 05.05.1998, Chaklashi Police Station was informed about

missing of Guru Gadadharanandji and as per the evidence collected and produced before the trial Court, Maruti van was set on fire in the early morning of 06.05.1998. According to Mr. Ravani, ld. Trial Judge was assisted by ld. Counsel appearing for the parties and ld. Counsel appearing for the CBI had submitted written arguments vide exh.312. The ld. Trial Judge has discussed thoroughly in the judgment under challenge the contentions placed before us and the say of the prosecuting agency has been rightly appreciated. Mr. Ravani submitted that the written arguments exh.312 available on record of the trial Court may be considered as the say of CBI before this Court also. We have gone through the written submissions exh.312 which are quite lengthy. According to us, inadmissible part of evidence is also referred to in the written submissions and it would not be prudent or necessary for us to quote any part of written submissions from exh.312. It would be appropriate for us to deal with evidence from various angles placed before us. Undisputedly, this is a case based absolutely on

circumstantial evidence and according to Mr. Ravani, chain of circumstance is visible and it is completely established and it is sufficient to link the accused with the crime. No other inference other than the guilt of the accused is possible. Conspiracy is mostly hatched in secrecy and it is not possible in all cases to find out evidence of hatching of conspiracy, but the investigating agency by collecting evidence, can positively plead before the offence of criminal conspiracy has been committed and the criminal conspiracy was hatched to commit offence in question.

(25) Mr. Ravani has divided his arguments in various parts. The first part deals with the evidence led by the prosecution as to the motive of the crime. The second part deals with an important circumstance whereby the prosecution has tried to prove that the deceased Gadadharanandji was last seen in the company of accused No.3 Madhavprasad and deceased had left Vadtal temple on 03.05.1998 at about 2.30 p.m. In a blue colour maruti van of accused No.3 Madhavprasad. The third part is regarding

incident- commission of murder at Navli Gurukul complex based on the facts disclosed by way of panchanamas drawn under section 27 of the Evidence Act and the information given by accused No.5. The fourth part is with regard to finding of a dead body by one farmer of the village viz. P.W. Shankar Damor and the evidence led by the prosecution to prove that the dead body was found and seen by P.W. Shankar Damor and the evidence collected by Bichchhuwada Police was that the dead body found was of missing Guru Gadadharanandji- evidence as to the identification of the dead body. The fifth part is about the conduct of accused No.3 -especially his act of setting his vehicle on fire on 06.05.1998 and the evidence collected to show that vehicle had not caught fire accidentally as alleged by accused No.3. The next part of his submission is regarding the element of false or insufficiency of explanation given by the accused that can be used as an important part while linking different circumstances in transforming into a complete chain of circumstances. The next part

of submission is about how the evidence led by the prosecution in case of circumstantial evidence requires to be appreciated and what type of proof should be treated as sufficient to say that a particular circumstance can be said to be proved and/or which evidence is sufficient to show the link between two different circumstances, ultimately capable of leading to a conclusion. In the last part of oral submissions, Mr. Ravani has summarized his arguments by placing reliance on some decisions of the Apex Court in support of his arguments advanced on different parts of his arguments placed before us.

(26) According to Mr. Ravani, the prosecution has proved the motive for commission of offence satisfactorily. Motive is mostly found hidden in the mind of the accused and even in case of circumstantial evidence, there is no need to bring as to exact and cogent evidence as to the motive. The proof of motive should be to the satisfaction of the Court and for that there is sufficient evidence in the present case as to

the motive of the crime. It is proved beyond doubt that accused No.1 was an assistant to the Kothari meaning thereby Assistant Kothari. Of course, there is no post, as per the scheme framed by the High Court of Asstt. Kothari, but at more than one place, it has come on record that accused No.1 was Asstt. Kothari and accused No.2 was always assisting and active in the administration of the office of Kothari. Accused Nos. 1 & 2 were in charge of Navli Gurukul. Main temple of Vadtal Gadi was having huge income and through the management of temple, a person in administration as Kothari, Asstt. Kothari etc. were enjoying the fruits of income along with the powers in dealing with day to day affairs of the temple. The deceased from the first day of his election i.e. immediately after his election as Chairman of the Temple Board, had become hurdle in the way of accused Nos. 1 & 2 and, therefore, in order to find out a way, conspiracy came to be hatched and incident of abduction as well as killing of Gadadharanandji had taken place. To prove the motive for abducting Gadadharanandji and killing him, the

prosecution has examined witnesses and in the evidence of P.W. Kinjal Joshi and P.W. Jatin Bhagat, there is sufficient material to show that accused Nos. 1 & 2 were getting big advantage of huge income of the temple. Mr. Ravani has taken us through the depositions of P.W. Yashvantray Trivedi, P.W. Kinjal Joshi, P.W. Jatin Bhagat and P.W. Babubhai Harischandra, P.W. Kapil Narmadashankar Joshi, P.W. Shashtri Hariprakashdasji, P.W. Premvatinand and also through the panchanama drawn by CBI during investigation i.e. search panchanama exh.244 and documents produced vide exh.215 i.e. bills, vouchers and purchase of material for the use of Vadtal temple and Bhojanshala exh.286, the evidence of the handwriting expert who has opined that the purchase of material were being done by accused Nos. 1 & 2. The evidence is brought on record to show that the accused Nos. 1, 2 & 3 had extra huge income due to the position of accused Nos. 1 & 2 in the office of Kothari. According to Mr. Ravani, deposition s of the above-said witnesses amply establish that the relations were strained

on the issue of transfer of Kotharis if are to be made by deceased Gadadharanandji. Apprehension of removal from the office of Kothari or replacement of Kothari Bhakti Kishoredasji, was the motive in the back ground of illegal income of accused Nos. 1 & 2 and in turn accused No.3 which they were getting. The enjoyment of the position in all other manner has also come on record. It is in the deposition of P.W. Kinjal Joshi that there was a telephone call from Acharya Maharaj when he was at Nasik to deceased Gadadharanandji expressing anxiety-inquiring about the transfer of Kotharis of Vadtal temple and the deceased was asked not to do it. It is also in evidence that Acharya Maharaj visited the temple at mid-night on the day. Accused No.2 Shrijicharan had gone to call Guru Gadadharanandji at his room (Ghar), but Guru Gadadharanandji had refused to accompany him at late hours and it is stated by this witness that at that time, accused No.1 Narayan Shashtri had administered threats to Guru Gadadharanandji, otherwise it has come on record that relations between Gadadharanandji and

accused No.1 were not strained. So far as recovery of huge amount in cash by way of deposits and investment bonds etc. are concerned, there is no satisfactory explanation from the accused and on the contrary, the documents examined by the handwriting expert and having been found in the handwriting of accused No.1, reveals that the accused No.1 was undisputedly in the office of Kothari managing the affairs and was entrusted the administration and management of huge income, it may be a temple income or produce of the properties including agricultural fields owned by the temple Board. Report of handwriting expert exh.256 shows that so far as purchase of grossery is concerned, there are handwriting s of accused No.2 Shrijicharan. So, these circumstances clearly show that office of Kothari and the management of the office of Kothari has voice in the management and such a situation places a person/appointee -Sadhu on a creamy post. This should be looked into the background of threats given on previous night and the conduct during the meeting leading to

serious disputes when agenda item as to transfer of Kotharis of Vadtal temple was discussed. However, for un-known reasons, issue of transfer of Kothari of Vadtal temple could not be taken up, though one or two transfers were made by passing resolutions in that crucial meeting. The act of accused No.1 in introducing himself as messenger of Acharya Maharaj for calling the deceased in the background of the agenda as to transfer of Kothari, is a circumstance need appreciation especially when accused No.1 was working as Asstt. Kothari or Assistant to Kothari. In a function, social or religious, accused No.1 was posing himself to a representative of Kothari of Vadtal Gadi Temple and he had paid visit at the place of Durgesh Bhatt along with the team of other Sadhus including Kinjal Joshi. It is true that there was no apparent animosity between the deceased and accused No.1 and/or accused No.2. On the contrary, this situation itself took some more time in unearthing the real motive behind the crime and the agencies entrusted that inquiry and investigation including CBI took some more

time. Under a seizure panchanama drawn at the residence-premises given to accused Nos.1, 2 & 3, the CBI has collected reasonably good evidence and this evidence is available in the nature of muddamal before the Court. It clearly shows the inter-se relations of accused Nos. 1,2 & 3 and the position that accused Nos. 1 & 2 were enjoying. The status of deceased in the management of the Board after 11.04.1998 was very high. He was entitled to one more vote to get the resolution passed in the nature of casting vote. Considering the scheme framed by the High Court, he was immediate next person who can be said to be enjoying the highest position for all temples and other institutions including Gurukul etc. under Vadtal Gadi of Swaminarayan Sect than Acharya Maharaj. It is possible to infer legally and reasonably that all these situations were sufficient to raise apprehension as to the replacement of Kothari of Vadtal Temple and in turn Assistant Kothari. It is not necessary to prove by prosecution, according to Mr. Ravani, that the accused must have a very strong motive or cause to commit murder of a

person and the prosecution has proved the motive for crime satisfactorily.

(27) The prosecution has also proved satisfactorily one more circumstance which is very important and that circumstance is that the deceased Gadadharanandji was last seen in the company of accused No.3. This evidence is rightly appreciated by ld. Trial Judge. P.W.16 Chiman Parmar, an employee of Temple Board, has stated on oath that on the date of incident, this witness was on his duty. He is serving in the office of Temple Board. He serves tea-coffee, arranges for stay and also doing other work as asked by Kothari. He is also doing the work of rubbing sandle-wood to transform it into wet dusty powder so that the same can be used in performing pooja etc. There is a small room for this work. This work is being done on machine. Normally, he stops machine at about 1.00 to 1.15 p.m. and this room is very near- adjacent to the room of deceased Gadadharanandji. He was sitting on the otla opposite to the room of the deceased Gadadharanandji after switching off the machine

and he had seen accused No.3 sitting on the steps of Sabha Mandap and a blue colour car was parked near the steps. We have seen Sabha Mandap referred to by certain witnesses including P.W.16 Chiman Parmar. It is just near the room of deceased Gadadharanandji wherein the deceased was allegedly resting. In the evidence of Kinjal and Jatin Bhagat, it has come on record that who accompanied them for sacred thread ceremony (Janoi ceremony) at the place of one Durgesh Bhatt. Accused Nos. 1 & 2 got separated before return of all of them saying that they are required to go to Zundal village. When accused No.1 got this message on his mobile phone, it was gathered by this witness that telephone call was from accused No.3. There is nothing on record to show whereby it can be inferred that accused Nos. 1 & 2 or any of them had gone to Zundal village. Witness Chiman Parmar has stated that accused No.3 Madhavprasad who was sitting at Sabha Mandap, but when he came back after bringing tea at about 2.20 p.m., accused No.3 and the car that was parked near to Sabha Mandap, were not there. The Court should see

proximity of time and this aspect is supported by the deposition of P.W.15 Nazirmiya. PW Nazirmiya has been treated as hostile by the ld. APP. It is an important circumstance to be considered that PW Nazirmiya was serving with temple mainly as a drum-player and was doing other work also. His presence in the temple is very natural at the time of incident. He was knowing residents of the temple including Brahmcharis, Sadhus and Bhagats (Parshads). This Nazirmiya gets corroboration from other circumstances shown by the prosecution i.e. from the say of P.W. Chiman. It is not a matter of dispute that accused No.3 was occupant of a blue colour maruti van and the registered owner of the said car is nobody but his Guru. It is in evidence that accused No.3 is having one white colour maruti car. When witness Nazirmiya has categorically said that he had seen Guru Gadadharanandji going out with accused No.3, there was no reason to disbelieve this part of evidence of PW Nazirmiya. Referring to the deposition of PW Dhiren Jayantibhai Laria (exh.239), Mr. Ravani has submitted that in

proximity of that relevant time, there was a telephonic talk/conversation between P.W. Rakshit Shah and accused No.1 Shrijicharan. This PW Rakshit Shah is declared hostile by the prosecution, but the allegation is that this Rakshit Shah had arranged for a girl- Minaxi and Minaxi was to reach at agreed destination (Navli Gurukul). There can not be any evidence to prove the enticement made by the accused persons or any one of them so that the deceased can be induced and he can be taken out of temple premises. It is true that there is no direct evidence except the evidence of Nazirmiya because no other witness has said before the trial Court that he had seen missing Guru Gadadharanandji in the company of accused No.3. The presence of PW Chiman Parmar and PW Nazirmiya when is found natural, there was no reason for the lower Court to discard the evidence of PW Nazirmiya that he had seen deceased Gadadharanandji and accused No.3 Madhavprasad when they were sitting in blue colour car and he had also seen that car going out. Placing reliance on certain decisions, Mr.

Ravani has submitted that acceptable part of the testimony of a witness can be read in the evidence and entire testimony is not required to be excluded. The hostility shown to the prosecution would not make that witness totally untrustworthy. There are more than one decisions, but Mr. Ravani has taken us through the observations made by the Apex Court in the case of **Gura Singh v/s State of Punjab, 2001 CrLJ 487(SC),** wherein the Apex Court has said:-

> 11. There appears to be misconception regarding the effect on the testimony of a witness declared hostile. It is a misconceived notion that merely because a witness is declared hostile his entire evidence should be excluded or rendered unworthy of consideration. This Court in ***Bhagwan Singh v. State of Haryana, AIR 1976 SC 202 : (1976 Cri LJ 203),*** held that merely because the Court gave permission to the Public Prosecutor to cross-examine his own witness describing him as hostile witness does not completely efface his

evidence. The evidence remains admissible in the trial and there is no legal bar to base conviction upon the testimony of such witness. ***In Rabindra Kumar Dey v. State of Orissa, AIR 1977 SC 170 : (1977 Cri LJ 173)*** , it was observed that by giving permission to cross-examine nothing adverse to the credit of the witness is decided and the witness does not become unreliable only by his declaration as hostile. Merely on this ground his whole testimony cannot be excluded from consideration. In a criminal trial where a prosecution witness is cross-examined and contradicted with the leave of the Court by the party calling him for evidence cannot, as a matter of general rule, be treated as washed off the record altogether. It is for the Court of fact to consider in each case whether as a result of such cross-examination and contradiction the witness stands discredited or can still be believed in regard to any part of his testimony. In appropriate cases the Court can rely upon the part of testimony of such

witness if that part of the deposition is found to be credit-worthy.

(28) He has placed reliance on other decision on this point in the case of **Koli Laxmanbhai Chandabhai v/s State of Gujarat, 2000(2) GLR 1151 (SC), Raj Bahadur v/s State, 1996 CrLJ 2346 (Delhi High court), Gajanand v/s State of Gujarat, 1987 CrLJ 374 (Guj), SGP Committee v/s MP Das Chella, AIR 1998 SC 1978.**

It is argued that in view of the ratio of the decisions cited above, it is obligatory on the accused persons to explain the circumstance in which a missing person and the accused parted company. Mr. Ravani has taken us through relevant part of the decision in the case of **Sahdevan alias Sagadevan v/s State Rep. by Inspector of Police, Chennai, VI 2002 CCR 206 (SC) (para 19)** and decision in the case of **State of West Bengal v/s Mir Mohammad, (2000)8 SCC 382 (SC) (= AIR 2000 SC 2988).**

(29) Navli incident has been proved by the

prosecution mainly on the strength of discovery of fact made by accused No.5. Important witnesses from Navli including PW Ghanshyam Bhagat have not supported the case of the prosecution, but according to Mr. Ravani, section 27 panchanama drawn by CBI is an important aspect. Till accused No.5 took investigating agency at the actual spot of murder committed, nobody was knowing the actual place of the crime. Place of commission of offence has been shown or pointed out by accused No.5. So, the prosecution could discover the place only because of accused No.5. The deposition of PW Sushil Purohit (exh.197) shows that the place of incident was shown by accused persons in his presence. Panchanama is at exh.198. It is in evidence that initially, CBI had not taken the videographer with it, but thereafter, Videographer was called and videography was made of the events that had occurred. The IO has proved the panchanama exh.198 and according to Mr. Ravani, there was no reason for the trial Court to reject the say of the IO examined vide exh.296 whereby he has

proved the fact of drawing of panchanama exh.198 in presence of panch at Navli Gurukul. Of course, PW Minaxi Patel (exh.247), Utsav Tanna (exh.228), Rakshit Shah (exh.165), Ghanshyam Bhagat (exh.227) have not supported the prosecution case, but the evidence of IO, Panch Sushilkumar and document exh.198 has been rightly considered by the trial Court and there is no reason to discard this part of evidence. This Court also should hold that the deceased was murdered at Navli Gurukul. Mr. Ravani has pointed out that from the print-outs obtained from Cellular Telephone Service Provided, it reveals that there were frequent talks between Rakshit Shah exh.165 and accused No.2. However, P.W. Mafatbhai has proved (i) that PW Minaxi was called by CBI, (ii) she was shown certain photographs, (iii) she had identified that those photographs are of a person with whom she had established physical relations, (iv) it is also proved by this witness that these photographs were of Guru Gadadharanandji. It has come on record that the photographs shown to PW Minaxi, PW Mafatlal are of deceased Gadadharanandji. So,

the story of PW Minaxi placed by the prosecution can not be said to be a total hoax. When Rakshit Shah is found to be telling lie and suppressing truth and when it is on record by way of print-outs obtained from Cellular Telephone Service Provider that PW Rakshit- a person responsible to arrange for a girl and accused No.1 had a telephonic talk/conversation prior to the incident and even subsequent to the incident, is indicative of one fact that for certain unascertainable reasons, these four witnesses have not supported the case of the prosecution. However, the basic element of their inter-se relations i.e. relations between Rakshit Shah and Minaxi and relations between accused No.1 and Rakshit Shah and capacity to identify deceased Gadadharanandji through photographs by Minaxi, are sufficient to draw an inference that deceased Gadadharanandji might have left the room and temple premises under some enticement. Even if inadmissible part of panchanama drawn at Navli is ignored, the fact of showing of Navli as a place of incident by Vijay Bhagat, is a discovery of a fact

admissible in evidence under section 27 in view of the scheme of section 8 of the Indian Evidence Act. Showing of a place by accused is a relevant fact qua the conduct of the accused and it should be considered by the Court while evaluating the validity and legality of the judgment. According to Mr. Ravani, the evidenced led by the prosecution qua Navli incident should be read in the background of other aspects like approximate time of death of a person whose dead body was found in the outskirts of village Barothi assessed by Dr. Gupta who performed the post-mortem. Nobody under Bichchhuwada Police Station or panchas or doctor were aware about the person found murdered and also the place. When the say of the prosecution is that the deceased has been murdered any time between 5.00 p.m. and 6.30 p.m., then the time of death assessed by Dr. Gupta becomes relevant.

(30) It is submitted that the prosecution has proved the fact of recovery of a dead body found lying in the outskirts of village Barothi and has successfully proved that dead body by

Bichchhuwada police was of missing Guru Gadadharanandji. To prove this, Mr. Ravani has taken us through the depositions of the following witnesses:-

(1)Exh.248- Shankarbhai T.Damor
(2)Exh.268- Dr. Rajkumar Gupta (Dead body examined)
(3)Exh.289 – Police Sub Inspector – Naramsinh Harisinh Bhatti.
(4)Exh.99 - Prafulchandra Dayashankar Mehta (whose wife is niece of Radiyatba and Guru)
(5)Exh.101- Jatin Bhagat
(6)Exh.109- Dr. Himatbhai Punjabhai.
(7)Exh. - Dr. Venaliteshwar G.Rao
(8)Exh.141- Chandrakumar Mahendrakumar Jain (CFL Office, Delhi- Key Identified)
(9)Exh.94- Dr. Upen Harivadan Diwanji.

(31) Mr. Ravani has further submitted that the prosecution has proved the case of identification of the dead body of the deceased by performing DNA Test with his real sister, i.e. Radiyatba. The report thereof has proved

that the DNA test performed proved that Radiyatba and Guru Gadadharanandji are having blood relations and their DNA Test found positive.

Mr. Ravani has, in view of above, stated that the Supreme court in the case of **Kamalnathan v/s State of T.N. (2005)5 SCC 194,** has considered the aspect and found that while considering the case of dead foetus to establish paternity in rape case, DNA Test is scientific and completely reliable.

II. So far as key found is concerned, it is submitted by Mr. Ravani that the key was found by Police Station Officer of Bichchhuwada Police Station from the place of incident. Similar keys were found from Jatin Bhagat and Kinjal Joshi. The evidence has come on record that there were three keys of the room, which was occupied by Guru Gadadharanandji at Vadtal Temple. One key was with Kinjal Joshi and second was with Jatin Bhagat and third with Guru Gadadharanandji. The key found at the place dead body had matched with lock, which was applied at the room by Guru

Gadadharanandji. The FSL report on the subject is proved by the prosecution by examining Chandrakumar Mahendra Jain (Exh.114).

(32) It is submitted that the dead body found at Bichchhuwada was having denture of three golden teeth. Dentist Shri Upen Diwanji was examined. Dentist has admitted by recognizing the photographs of Shri Guru Gadadharanandji that he has treated him for implanting three teeth (exh.95). Under such circumstances, it is proved beyond doubt that the dead body found at village Barothi of Rajasthan State was having denture of three golden teeth. Same way, Shri Guru Gadadharanandji was also having denture of three golden teeth in view of deposition of Dentist Shri Upen Diwanji.

The defence has not explained the availability of documents at Exh.98 with them. They have not claimed to have the original of Exh.98 and only with a view to create confusion, such document is produced. Even otherwise, it does not wipe out the aspect that there was no

denture to Guru Gadadharanandji nor was he treated by Dr. Upen Diwanji for applying the denture of three teeth. Under the circumstances, Exh.98 has no bearing at all on the case of the prosecution.

(33) According to Mr. Ravani, the prosecution has successfully proved beyond doubt that accused No.3 was having a car registered in the name of his Guru and he was possessing and using the vehicle and blue colour maruti van was considered to be the vehicle of accused No.3 for all purposes. Nobody has said that blue colour maruti van was seen or noticed by anybody after 2.30 p.m. on 03.05.1998 till it was found lying in the motor guarage in a burnt condition. In between these two periods i.e. 2.30 p.m. on 03.05.1998 and CBI located the vehicle in a motor guarage of PW 13 Mohammad Nazim Usmanbhai Shaikh on 15.03.1999, the accused No.3 had lodged a claim i.e. O.D. Claim before the Insurance Company. Therefore, the vehicle was inspected and surveyed by the official surveyor of The Oriental Insurance Company (PW 6

Arvindbhai Chaturbhai Patel, Exh.123) and the claim lodged by accused No.3 was found unacceptable for the reasons mentioned in the report submitted by PW 6 Arvindbhai. This conduct of accused No.3 is a guilty conduct and it amounts to an action taken by accused No.3 to mislead the investigating agency and also to destroy the very important evidence that the investigating agency could have collected from that vehicle. Mr. Ravani has taken us through relevant part of the deposition of PW 6 Arvindbhai Patel (exh.123) and PW 13 Mohammad Nazim Shaikh. Of course, PW 13 Mohammad Nazim Shaikh has not supported the case of the prosecution, but according to Mr. Ravani, the version of this witness is very relevant whereby he has said that he is running a guarage near Borsad Chokdi (Cross-Roads) and the vehicle was brought in a motor lorry to his guarage. He had told the person who brought the vehicle that vehicle is beyond repairs. However, it was insisted by that person that the vehicle-car be kept there. That person had put on cloths like “Maharaj”. This witness was also assured that

they would take their vehicle back on the next day from his guarage, but till CBI people during investigation reached at the spot i.e. guarage on 15.03.1999, that person- Maharaj had not returned to get the possession of the burnt vehicle. The statement made by accused No.3 in the capacity of the claimant as well as in the writing by way of presenting form of motor vehicle claim, is very relevant. The surveyor found that the vehicle has not sustained damage by accidental fire. In this background, the oral evidence of Asstt. Administrative Officer PW 7 Bhailalbhai Solanki of The Oriental Insurance Company should be appreciated and the ld. Trial Judge has rightly appreciated this part of evidence while holding that this conduct of accused No.3 goes against accused No.3 and the defence version. The Surveyor PW Arvindbhai was having about 12 years' experience and worked as professional surveyor with various nationalized companies including The Oriental Insurance Company. The report of the survey carried out by PW Arvindbhai was sent to Petlad Branch. He has proved the relevant documents and registered

owner PW 11 Laxmiprasad was informed about the rejection of the claim. Undisputedly, this PW 11 Laxmiprasad was not driving the vehicle at the relevant point of time, nor he himself had placed the claim before the insurance company. It emerges from the evidence that the application in the prescribed format pressing the claim before the insurance company as well as the request extended to get the vehicle surveyed are signed by accused No.3. As it is clear from the evidence that accused No.3 was residing with PW 11 Laxmiprasad- a registered owner of the maruti car in question. According to PW Laxmiprasad, his vehicle was taken by one Rakesh at Rajkot on 25th and on 2nd or 3rd day, Rakesh had informed him that the vehicle is burnt because of leakage of gas. He has said in his deposition that he had deputed Madhavprasad to lodge the claim and Madhavprasad had also gone to Anand for inquiring into the matter. He has accepted that exh.129 requesting the insurance company to survey the vehicle is in the handwriting of Madhavprasad. He has also stated that Madhavprasad had gone at the spot of

accident. According to this witness, original documents including registration book etc. were with Madhavprasad. This witness was not sure whether Madhavprasad had returned back even at late night of 03.05.1998. He has accepted in the cross-examination by Spl.PP that he has not driven this vehicle since the day it is purchased as he does not know driving. He has accepted that if the driver is not available, then in that eventuality, Madhavprasad was driving the vehicle and it was being parked before their residence. This witness has accepted that Harjivandas Vishnudas is his Gurubhai and this Harjivandas is the Guru of accused No.3 Madhavprasad. It is in evidence of PW 10 Chandraprakash Swami that he is residing in “Lakkadpitha Wanda”, one residential complex of Vadtal temple and there are 3 to 4 houses between his residence and residence of accused No.3. He has also stated that in the year 1998, accused No.1 was the Asstt. Kothari. Accused No.3 was residing with Laxmiprasad and the vehicle of Laxmiprasad was being driven by accused No.3 Madhavprasad. When he was i n his

office, he was intimated that his vehicle has met with an accident and he had gone to the spot of accident with Madhavprasad to take the vehicle back from that place. At that time, one Govindbhai from insurance company had also accompanied them. Photographs were taken by the insurance company people. According to this witness, they had taken a tempo with them. Maruti was loaded in that tempo and it was brought to the guarage of PW Mohammad Shaikh. Thereafter, this witness had gone to the very guarage with some officers and at that time, panchanama exh.135 was drawn. He has also stated that once he was one of the trustees of Navli Gurukul and Ghanshyam Bhagat was also one of the trustees. Thereafter, he had left trusteeship along with his Guru and thereafter accused No.1 Narayan Shashtri, accused No.2 Shrijicharan etc. have become trustees of Navli Gurukul. The evidence of this witness, if considered,according to Mr. Ravani, in the background of FSL evidence, it is difficult to accept the arguments advanced by ld. Sr. Counsel Mr. Thakkar that the finding recorded by the

surveyor of insurance company is either incorrect or confused being contrary to the opinion expressed by the guaragewala PW 13 Mohammad Shaikh and the FSL report should not be considered as a document incriminating against the accused. It is difficult to accept, according to Mr. Ravani, that the presence of inflammable substance found in the sample analyzed by FSL Experts is because of the reason that mechanics were putting such or similar things stained with petrol or diesel etc. inside the burnt vehicle. Accused No.3 has not explained to the satisfaction of the trial Court while giving statement under section 313 of CrPC about the burning of the vehicle and there is no plausible explanation from accused No.3 that when and why he left Vadtal temple or when he had left the place where he had paid visit because the time of alleged dashing of vehicle and catching fire because of LPG gas leakage from the cylinder which was there in the vehicle, appears to be odd hours. When he posed himself to be a driver of the vehicle at the relevant point of time before the insurance

company, he was competent to explain the contingency in this regard in a clear-cut manner. When a vehicle is catching fire and that too accidentally and because of LPG gas leakage, normally, nobody would wait or try to get LPG cylinder fixed in the vehicle removed so that one can save the cylinder. Absence of gas cylinder in couple of hours at the time when survey was carried out and photographs were taken etc., needs consideration because PW 6 Arvindbhai (exh.123) has said that gas cylinder was not found when vehicle was inspected/ surveyed. Of course, the vehicle was having facility for fixed LPG gas Cylinder. So, it was possible to drive the vehicle in both the ways i.e. using the vehicle by fixed LPG gas cylinder and also by petrol. There were no signs of explosion of gas cylinder. Under the circumstances, burning of a vehicle on account of gas leakage is not found to be the story worth accepting. According to Mr. Ravani, as there were no signs even on the tree of dashing of vehicle with that tree, the place where the vehicle was lying in a burnt condition, is also

a circumstance which goes against the theory placed before the insurance company and thereafter before the Court. Mr. Ravani has shown photographs taken by the surveyor and the vehicle in question is seen just near the tree. According to Mr. Ravani, the say of guaragewala and expert in the field i.e. PW 6 Arvindbhai needs close scrutiny. According to Mr. Ravani, this part of the evidence collected by the investigating agency and placed during trial, is a serious incriminating circumstance against the accused person.

(34) Mr. Ravani has placed number of other circumstances which can be said to be incriminating circumstances against the accused before us and has submitted that no reasonable and/or acceptable or plausible explanation has been given qua these circumstances and these circumstances, according to Mr. Ravani, are:-

(i) The place where the dead body of the deceased was thrown from a small vehicle into a ditch and then set on fire, is shown

by accused No.3. This circumstance is relevant in view of the scheme of section 8 R/w section 27 of the Evidence Act;

(ii)The fact of disposal and destruction of the body of deceased Gadadharanandji was within the exclusive knowledge of accused persons including accused No.3 who pointed out the place in the outskirts of village Barothi;

(iii)At the instance of accused No.3, the place where dead body of deceased Gadadharanandji was disposed of has been discovered. This is one of the strong circumstances against accused No.3 and the present case being a case of criminal conspiracy, all the accused persons are equally responsible for the act of disposal and destruction of the dead body of deceased Gadadharanandji;

(iv)The car was in the name of Laxmiprasad Swami, but it is clear from other circumstances that this Laxmiprasad was only an ostensible owner, but the car was possessed, used and enjoyed by accused No.3

and the statement made by accused No.3 before the insurance company either in writing or orally, can be used against all the accused persons and more particularly against accused No.3;

(v)The date of lodging of the complaint i.e. 06th May,1998 and the evidence of information given to Chaklashi Police Station in writing by Jatin Bhagat on 05.05.1998, is indicative of the conduct of accused No.3 and the decision that might have been taken by the conspirators of destroying the car;

(vi)At the spot where the dead body was found by Bichchhuwada Police, a panchanama was drawn including map prepared which clearly indicates the presence of wheel marks of a small car. This also indicates the entry of a vehicle in a direction to a ditch leaving the main highway and returning back of that very vehicle on the high way;

(vii)The place of murder at Navli Gurukul Complex is shown for the first time to the investigating officer by accused No.5 and

that too in the presence of panchas under section 27 panchanama. This panchanama, even after ignoring inadmissible part thereof, it was possible for the trial Court to use certain part of this panchanama against the accused persons considering the scheme of section 8 R/w section 27 of the Evidence Act and this circumstance has not been explained in a satisfactory manner;

(viii)The evidence of PW Jagdish Soni (exh.198) shows that accused No.5 Vijay Bhagat had gone to sell gold chain which the deceased Guru had put on and obtained a new gold chain;

(ix)The list of telephone calls made from mobile phone of accused No.2 Shrijicharan Swami clearly indicates that accused No.2 Shrijicharan Swami and PW Rakshit Shah were in acquaintance with each other and there were telephonic talks and conversations between accused No.2 and PW Rakshit Shah. To prove this, ample evidence is produced that PW Rakshit Shah was having land-line

telephone connection of BSNL at his residence and telephone number was 32670 and accused No.2 Shrijicharan Swami was having mobile phone having subscriber number 98250 17197. PW Rakshit Shah, with a view to help accused No.2 Shrijicharan Swami, has not supported the case of the prosecution. However, his say about the telephone connection that he had at relevant point of time, if read vis-a-vis the telephone print out and produced in evidence by prosecution, the accused No.2 Shrijicharan ought to have explained these circumstances to the satisfaction of the Court while giving statement under section 313 of CrPC.

(35) Placing reliance on the decision in the case of **Venkatesh v/s State of Karnataka, (2005)7 SCC 704,** it is submitted that the recovery of dead body at the instance of the accused is an evidence admissible under section 8 of the Evidence Act because the act of taking IO at the place where the dead body is lying, is a conduct

of the accused irrespective of the fact whether the statement made by the accused-contemporaneous with or antecedents to such conduct falls within the purview of section 27 or not. The Apex Court has observed that even if the disclosure statement is held to be not admissible under section 27 of the Evidence Act, till it is relevant if it is capable of leading IO to the dead body. According to Mr. Ravani, the act of disposal and destruction of the dead body of the deceased is done under the criminal conspiracy. So, it was not necessary for the prosecution to prove that all the accused persons had taken part in that act of disposal of the body and destruction of it. Placing reliance on the decision of the Apex Court in the case of **State (NTC, Delhi) V/s Navjot Sandhu etc. (2005)11 SCC 600,** wherein the Apex Court has observed as under:-

> “251. We shall then consider whether the conviction of Afzal under Section 120-B read with Section 302 IPC is justified. The High Court upheld the conviction and gave death

sentence to the two appellants under this section. We are of the view that the conviction and sentence on this count is in accordance with law. The conspiracy has many dimensions here. It is implicit in the conspiracy to attack Parliament that it extends to all th offensive acts, intimately associated with that illegal objection. Indulgence in terrorist acts, killings and injuring persons who are most likely to resist the attackers, using explosive devices, firearms and other dangerous things in the course of attack, “aging war” against the Government of the country are all various manifestations of the conspiracy hatched by the deceased terrorists in combination with the appellant Afzal. The mere fact that no particular person is the target of attack of the conspirators, does not make any difference in regard to the applicability of Section 300 IPC. The intention to cause death or the intention of causing bodily injury as would in all probability cause death is writ large in

the conspiracy directed towards the indiscriminate attack on Parliament of the nation when it is in session. The opening clause of Section 300 says that “except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death”, Clause fourthly says:

> “ If the person committing the act knows that it is so imminently dangerous that it must, in all probabilities, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.”

These clauses squarely apply to the case on hand. Illustration (d) to Section 300 is instructive. It reads thus:

> “(d) A without any excuse fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premediated design to kill any particular individual.”

The conspiracy to commit the offence of murder in the course of execution of conspiracy is well within the scope of

conspiracy to which the accused Afzal was a party. Therefore, he is liable to be punished under Section 120-B read with Section 302 IPC. The punishment applicable to one prescribed under Section 109 IPC in view of the phraseology of Section 120-B-- "be punished in the same manner as if he had abetted such offence". Section 109 IPC lays down that:

> "If the act abetted is committed in consequences of the abettment, and no express provision is made by this Code for the punishment of such abetment (a person abetting the offence shall) be punished with the punishment provided for the offence."

Thus, the conspirator, even though he may not have indulged in the actual criminal operations to execute the conspiracy, becomes liable for the punishment prescribed under Section 302 IPC. Either death sentence or imprisonment for life is the punishment prescribed under section 302 IPC."

The ratio propounded by the Apex Court in the above-cited decision is applicable to the

facts of the present case if the Court finds that the criminal conspiracy was hatched to eliminate the deceased Gadadharanandji. On the same point, Mr. Ravani has placed reliance on the decision of **Bodh Raj v/s State of J & K, (2002)8 SCC 45,** because according to the prosecution, that very accused i.e. accused No.3 who led CBI officials at the place where the dead body was disposed of and destroyed, was the person-accused in whose company the deceased was last seen when both of them left Vadtal temple in blue car.

(36) It is argued that this is a case of circumstantial evidence. The prosecution has established circumstances by placing various circumstances in the form of a chain and the evidence as to motive of crime to eliminate Guru Gadadharanandji is also satisfactorily proved. The only apprehension of the removal from the activities and powers that they were enjoying in the office of Kothari, had led accused Nos.1 & 2 to the extreme steps to eliminate Guru Gadadharanandji. The prosecution is not supposed to establish each circumstance by

leading cogent and convincing evidence, but each circumstances placed by the prosecution, should be proved substantially and to the satisfaction of the Court and if such circumstances are capable of forming a chain or to link the accused persons or any of them with the crime, then all conspirators satisfactorily linked with the crime can be held guilty. The conduct of any of the individual accused acting under conspiracy is found incriminating, then it can be considered as a circumstance against that individual accused and also against all conspirators. About Navli temple, incident is proved by PW Sushilkumar Purohit and in response to the query raised by the Court, Mr. Ravani has informed the Court that in the year 1998, it was not possible to ascertain the location of the telephone-caller or recipeant of telephone caller on mobile because no scientific device were either available or used by Cellular Service Provider Companies, otherwise the location of accused No.2 Shrijicharan Swami who was in the company of accused No.1 Narayan Shashtri could have been located immediately

after their separation from the group of Sadhus who had visited the ceremony at the place of PW Durgesh Bhatt. However, it is in evidence that accused Nos. 1 & 2 had left the place of PW Durgesh Bhatt within 10 to 15 minutes and leaving Jatin Bhagat and Kinjal Joshi at Nadiad, they separated from them saying that they wanted to go to Zundal. One of these witnesses was told that they want to go to Ahmedabad. It is also in evidence that this decision was taken as if it is a last minute decision and after receipt of a telephone call. PW Rakshit Shah has given his telephone number in his examination-in-chief and there is no dispute as to the telephone instrument installed at the residence of PW Rakshit Shah. Suppression of truth by PW Rakshit Shah makes his say vulnerable, but absence of satisfactory explanation as to conversation that has taken place between accused No.2 Shrijicharan on the date of incident i.e. 3rd May,1998 or the attempts made to establish contacts, is an incriminating circumstance. The conduct of suppressing certain relevant aspects would go against that accused. No convincing

explanation is coming forth which can be said to be satisfactory qua the evidence collected by Bichchhuwada police on 04.05.1998 and in turn handed over to the team of CBI and mainly to IO Mr. Krishikar. It would be too remote and illogical to presume that CBI has collected samples from Bichchhuwada police to settle the score and to take prestige or pride in the department of unearthing a serious and sensitive murder case or there is a possibility of blackmailing the Bichchhuwada police because SHO of Bichchhuwada Police Station had failed in registering FIR of the offence punishable under section 302 of IPC. The lacuna of investigation, pointed out by ld. Sr.Counsel Mr. Thakkar, according to Mr. Ravani, are not sufficient to disbelieve or to create a shadow of doubt on the case of the prosecution. Prior to transfer of investigation to CBI, Chaklashi Police Station and Nadiad Town Police Station had remained in charge of inquiry and in searching of deceased Gadadharanandji for a very small period. LCB and thereafter State Crime Branch were investigating into the matter and those papers of

investigation were considered by CBI and but for the allegations made in a writ petition filed by Jatin Bhagat- a disciple of Gadadharanandji- in this Court, CBI has tried to dig out the truth. Therefore only, some of the persons arraigned as accused, ultimately have been dropped. There is no element of mechanical filing of a chargesheet by the IO. It is not possible, in view of the evidence led before the trial Court, to infer that CBI had acted in an unfair manner and selected persons have been arraigned as accused persons. There is no element of pick and choose before chargesheeting the accused. Section 27 panchanama drawn at Navli Gurukul or discovery of facts made by accused No.5, should be held to be proved to the satisfaction of the Court. There is no reason to disbelieve the version of the panch witness and mainly the officers who have drawn panchanamas. The Court can certainly rely on the evidence of IO. When number of witnesses have turned hostile, the Court can consider the evidence led by these hostile witnesses and if any part of the evidence led by these witnesses is found otherwise useful to the

prosecution case, the Court can rely upon the same and in evaluating the strength of the evidence led by the prosecution witnesses, the Court certainly can make use of such evidence as a corroborative piece of evidence.

(37) According to Mr. Ravani, the explanation of accused No.3 that panch Gautam selected by CBI was having inimical feelings against accused No.3, would not make the entire panchanama doubtful. There were inimical relations between accused No.3 and Sarpanch of Vadtal Gram Panchayat. Panch Gautam and Sarpanch Ramanbhai were prosecuted by accused No.3 by filing criminal complaint. If it is found that IO has not inquired about the independence of a panch, then the evidence of such a witness should not be thrown out only on that count and the evidence of such witness should be closely scrutinized and the Court should try to see whether any independent or sufficient corroboration is found. The say of PW Gautam gets corroboration from the deposition of PW Shankar Damor and Bichchhuwada Police and also

from IO Mr. Krishikar. At the most, panch witness Gautam can be said to be an interested witness, but he should not be branded as a lier or a person acting hands in gloves with CBI Officers so as to create the entire panchanama. Such a created panchanama would not get sufficient corroboration from other independent source. The conduct of the accused in the present case needs consideration especially when they had tried to mislead the investigating agency. In the present case, one document exh.98 has been brought on record during the course of cross-examination and it is submitted that this zerox copy of exh.98 was found in one of the sets of chargesheet supplied to the accused persons, but according to Mr. Ravani, the same is far from imagination otherwise this could have been found from the chargesheet papers of other accused and also in the bunch of papers supplied to the Court. The act of filing false claim by accused No.3 would go against the accused. Accused Nos. 1 & 2 had claimed valuables recovered as muddamal by CBI including a large sum of cash, is the conduct of accused

Nos. 1 & 2 under which it can be legally inferred that accused Nos. 1 & 2 have no serious dispute as to the recovery made under search and seizure panchanama exh.235 & 236 dated 28.03.1998 and on the date of judgment, the accused Nos. 1 & 2 were asked to return the muddamal handed over to them in exercise of the powers vested with the Court under section 451 of CrPC. Therefore, the documents recovered by CBI under a search list prepared and documents seized if are found relevant, then the same can be considered even if not read word to word while testing the strength of the case of the prosecution. Accused Nos. 1 & 2 had claimed some of the muddamal articles from the Court out of the muddamal seized and recovered during the investigation. So, the evidence of IO and panchas on the point can get corroboration from such conduct of accused Nos. 1 & 2. PW 45 Mahendrakumar Vyas has proved the search and seizure lists exh.235 & 236 and it has come on record that certain articles were recovered from the premises of accused No.3. The procedure followed by CBI officials in searching the

premises and seizure made in the presence of panchas on 28.03.1999 when is sufficient to hold that the recovery is genuine and the same is found doubtful after reading cross-examination of this witness i.e. PW Mahendrakumar, then each article seized from the residence of accused No.3 if is useful in testing the strength of the case of the prosecution, can be considered. Accused No.3 had not claimed cash amount of Rs.60,000/ recovered from his residence. No such document is either referred to by the ld. Trial Judge in his judgment nor the same has been placed before us by Mr. Ravani. It is submitted by Mr. Ravani that the prosecution has proved the following facts and we would like to mention as they are as reflected in the gist of the written submissions made before us by Mr. Ravani for the sake of convenience:-

(i)Deceased Gadadharanandji was holding key post of Chairman of Vadtal Temple of Swaminarayan Sect.

(ii)The accused No.1 herein was holding the

post of Assistant Kothari in the Vadtal Temple and the accused Nos. 2, 3 & 4 were living as saints in the temple since beginning.

(iii)The accused Nos. 1 & 2 were getting huge financial benefit from the purchase made for Vadtal temple. This fact has been proved.

(iv)The accused No.3 was seen along with the deceased at Vadtal Temple and passed from there together.

(v)The fact that accused No.2 was at Vadtal between 1.30 and 2.30 p.m. and was at Navli between 3.00 and 5.00 p.m. is proved.

(vi)The fact that the accused No.2 had purchased seven tins of cold drinks from Sahjanand Cold Drinks located outside Vadtal Temple on that very day, is proved.

(vii)The fact that accused No.5 had shown the place of incident at Navli has been established by Panchanama and video cassette.

(viii)The dead body was thrown in the limits of Bichchhuwada Police Station, Rajasthan,

and the said fact has been proved through the place shown at the instance of the accused No.3. This fact is also established through cogent evidence.

(ix)The said dead body was lying unclaimed in the limit of Bichchhuwada Police Station on 4th May 1998, which is proved by inquest panchanama, post-mortem report, videography and various witnesses.

(x)The accused No.3 had thrown the dead body in the limits of Bichchhuwada Police station and had shown the said place. On the basis of it, CBI collected all the evidence from Bichchhuwada Police Station.

(xi)The fact that the dead body was of Guru Gadadharanandji has been proved by reports of FSL/Key/DNA Test, etc.

(xii)It is proved that the accused Nos. 1 to 5 are involved in the murder of the deceased. It is also proved through the evidence of Insurance Company and the FSL that after disposing of the dead body, on 6th May 1998, attempts were made to destroy Maruti Van No. GJ-6A-1894 showing that it was

destroyed in the accident. It is also proved that the chain found from the dead body of the deceased was also sold to goldsmith.

(38) Though M. Thakkar has attempted to submit that there is a clear confusions to the number of keys allegedly recovered by CBI during the course of investigation, but if the oral evidence is appreciated in the light of the search list produced and exhibited including the deposition of the IO, it is clear that only three keys are there and there is no confusion even as to the description of the keys. Each key recovered by CBI is found engraved with name “Tri Circle, China”. However, in the panchanama, at one place, instead of “OOO”, “OO”” has been mentioned. But normally the panchanamas (seizure memos) are being drawn as per the say of panchas and, therefore, the Court can very well ascertain this aspect by giving a look at the muddamal keys as muddamal is called for by this Court. The opinion of the expert who has examined all the three keys along with muddamal

lock engraved with similar name “Tri Circle, China”, has opined that total three keys are examined. At one place, it is mentioned in evidence that keys recovered lying near the dead body by Bichchhuwada police was an iron key. At other place, these keys are described as brass keys. In this regard, according to Mr. Ravani, the same can be resolved by seeing the articles to ascertain the correctness so that the confusion created in reference to “OO” in one of the seizure memo can be resolved. When keys as articles were seized as and when recovered made firstly by Bichchhuwada Police and thereafter the other articles by CBI, rules out the possibility of planting any key vice the other. It is true that there is no expert opinion as to the metallic components of keys examined, but it is clear from the evidence that keys lying near the dead body was one of the three keys of muddamal lock which was used by the deceased and other prosecution witnesses namely Jatin Bhagat and Kinjal Joshi for locking the residence/room of deceased Gadadharanandji. So, the key found lying near the dead body of

deceased Gadadharanandji and recovered by Bichchhuwada police is an important circumstance in resolving the dispute raised by the accused as to the identity of the body of the person deceased found by Bichchhuwada police. CBI has attempted to collect the maximum evidence . DNA fingerprinting is considered to be a very important and conclusive type of evidence. So, keeping in view the oral evidence of close relative of the deceased viz. Radiyatba and that way related some how with deceased Gadadharanandji, and other expert evidence of the doctor who has drawn blood sample of Radiyatba so that it can be sent for DNA fingerprinting opinion of the expert and expert evidence of Dr. VG Rao (exh.273), should be considered sufficient evidence on the point of identification of the dead body. A key recovered by Bichchhuwada Police station lying near the dead body tied with a burnt thread, is by itself sufficient evidence on the issue of identity, irrespective of the evidence on the point of denture given by Dr. Upen Diwanji.

(39) Stating certain decisions, it is argued by Mr. Ravani that the Court should give due weightage to the evidence of IO and police personnel examined during the trial and their evidence should not be viewed with doubt or with any other suspicion. Mr. Ravani has taken us through certain decisions of the Apex Court in the case of **A Girdhari Lal Gupta and another v/s D.N.Mehta, Asstt. Collector of Customs and another, AIR 1971 SC 28, Mohanalal Gangaram Gehani v/s State of Maharashtra, AIR 1982 SC 839 and Smt. Basanti v/s State of Himachal Pradesh, AIR 1987 SC 1572.** It is not necessary for us to reproduce the ratio propounded in any of these decisions placed before us because it is a settled legal position that if the Court is able to place reliance on the evidence of IO being trustworthy piece of evidence, then certainly, the Court can accept the evidence of police personnel- IO and it should not be viewed as a weak piece of evidence. In the present case, the prosecution has produced certain photographs of deceased Gadadharanandji and the same were shown the witnesses irrespective of

the observations made by the Apex Court in the case of **Kartar Singh v/s State of Punjab, AIR 1995 SC 1726**. This evidence is valid and legal evidence because the identity of the deceased can be established. If the dead body of the person deceased is found disfigured or heavily destroyed, then the deceased person can be identified by the witness from the photographs shown to such witness. In support of this submission, Mr. Ravani has placed reliance on the decision in the case of Navjot Singh Sandhu (supra). For short, according to Mr. Ravani, the conviction recorded by ld. Trial Judge against the accused should be confirmed and they should be held guilty of the charges leveled against them.

(40) Ld. APP Mr. KT Dave has also argued at length. Mostly, he has adopted the arguments advanced by Mr. Ravani, ld. Counsel appearing for CBI. However, we would like to state the gist of the submissions made by ld. APP Mr. Dave and the submissions made before us point-wise. They are;

(i)Since the date of election as Chairman of Vadtal Temple Board, deceased Gadadharanandji was holding key administrative position and on 03.05.1998, he was enjoying that position. So, in the capacity of the Chairman, he has certain powers including calling of a meeting of the Board of Trustees and to circulate an agenda of the items need to be discussed and resolved and he was residing in a premises inside the temple and in the area known as “Brahmchari Niwas”.

(ii)All the five accused were connected with Vadtal temple either as a Saint or Bhagat and except accused No.4, they were residing in Vadtal temple. Accused No.1 was Asstt. Kothari and was holding key post in a trust running a Gurukul (residential school) at Navli and accused No.2 was helping accused No.1. One Bhakti Kishoredasji Swami was Kothari of Vadtal temple. He was old aged and sick person. Accused No.2 Shrijicharan was disciple of Kothari Bhakti

Kishoredasji. Accused Nos. 1 & 2 were trustees together in Navli Gurukul.

(iii)Deceased Gadadharanandji, after his election as a Chairman, wanted to change Kothari at Vadtal temple along with other temples and he was to move proposal of transfers of Kotharis. In the agenda circulated for discussion, when accused Nos. 1 & 2 realized that transfer of Kothari of Vadtal temple also may be discussed by the Temple Trust Board and Board may pass such resolution of transfer and, therefore, the move of Gadadharanandji was not liked by accused No.1 and it appears from the conduct and co-ordination found from the evidence available on record of accused No.2 with accused No.1 that the accused No.2 being th disciple of Kothari Bhakti Kishoredasji, they developed an idea and ultimate motive to take some steps and that has led both of them to hatch a conspiracy.

(iv)The accused have selected the time to take/entice deceased away from Vadtal

temple premises, selected time during which time main gate of the temple remains closed and minimum number of people would be available in the compound of the temple and also at the gate and nobody would be there on the main gate at the time of abduction. It is alleged by the prosecution that in a pre-planned manner, under a conspiracy hatched, Gadadharanandji was taken out of temple premises. The prosecution has tried to prove that Guru Gadadharanandji was enticed by an offer to have a sexual pleasure. He being a Chairman having command over the administration of Vadtal Temple Board and having sufficient income both in cash and kind, would not have been tempted or induced by the offer of some cash amount and in this background, the case placed by the prosecution should be appreciated.

(v)It is proved that deceased Gadadharanandji left his room on 03.05.1998 without intimating anybody, suggests that abduction was under a wrong pretext and

even the deceased was in a mood to keep the purpose of his visit secret from all. Initially, the inquiry made by PW Jatin Bhagat- disciple of deceased Gadadharanandji was nothing but an attempt to know that his Guru has gone where? (“Guru kya gaya chhe?”) and nobody was knowing about the cause of leaving the temple area by Gadadharanandji, Jatin Bhagat was responded accordingly by those persons i.e. since after 2.00 p.m. on 03.05.1998, deceased Gadadharanandji was found missing from his room.

(vi)The presence of accused No.3 was noticed at nearby place from the room of deceased Gadadharanandji on 03.05.1998 and he was sitting on the steps of Sabha Mandap. Blue car was also noticed being parked there by PW 16 Chiman, but later on neither accused No.3 nor blue car was noticed/found by PW 16 Chiman. It is true that PW 16 Chiman has not said that blue maruti van of accused No.3 was found parked in the temple premises, but it has not come on record

that any other Sadhu or Brahmchari is having blue car. Main gate had just opened at about 2.00 p.m. So, there is evidence on record about the departure of Guru Gadadharanandji in blue car in some minutes- say about 2.30 p.m. or so from Vadtal temple. Therefore, the finding recorded by ld. Trial Court on this point, can not be said to be a finding based on conjecture or surmises.

(vii)There is sufficient evidence also on the point that deceased Gadadharanandji was last seen together with accused No.3 going in blue car from Vadtal temple, by PW 15 Nazirmiya and in number of cases, this Court and the Supreme Court has held the accused guilty of the charge for not rendering satisfactory explanation as to what had happened to a missing person or deceased as he (accused) was last seen together in the company of the deceased. It is in evidence that relations between the deceased and accused persons and with accused No.3 in particular, were not

inimical. Even in the past, none of the accused was inimical to deceased Gadadharanandji like Nautam swami who was initially named as one of the suspects of the offence of abduction and murder. Failure on the part of accused No.3 to give explanation about what had happened to deceased and the fact that he had withheld that fact, the trial Court was legally entitled to draw the inference that he has committed murder after abduction in view of settled legal position on the point.

(viii)On 04.05.1998, on the information given by a villager namely PW Shankar Damor, Rajasthan Police found one dead body of a male person in a burnt condition and along with the body, one key was found and it was recovered. Dead body was having golden teeth clip on some teeth and that body was found lying in a ditch. It was some feet away from the highway. Rajasthan police also found that there were tyre marks of a small car on the earth.

(ix)The prosecution has satisfactorily proved that the death of the deceased was because of Axpysia due to strangulation and it was a homicidal death. Evidence of Dr. Gupta shows that the dead body was burnt meaning thereby that first the deceased was murdered and then that dead body was burnt.

(x)There is sufficient evidence as pointed out by Mr. Ravani to conclude that (a) the dead body found by Bichchhuwada police was of missing Guru Gadadharanandji as there is evidence as to a key found lying near the dead body and the opinion of the expert on that point, and (b) the evidence of DNA fingerprinting, (c) evidence of golden teeth clip;

(xi)Vide sec.27 panchanama, the prosecution h as proved that the accused No.3 had shown the place where he had thrown the dead body of deceased Gadadharanandji and the place shown by accused No.3 under sec.27 panchanama was the same place from where Bichchhuwada police found one dead body of a male in a burnt condition on 04.05.1998.

This coincidence should be considered in the background of one fact that deceased Gadadharanandji was missing since the afternoon of 03.05.1998 and the doctor has opined who has carried out autopsy about the time of death.

(xii)It is in evidence that accused No.3 was using maruti van having blue colour registered in the name of Laxmiprasad though he was not the owner of it. The original papers including registration book etc. were also lying with him. Accused No.3 is owning one more car of white colour. So, it can legitimately be inferred that the car registered in the name of somebody else than accused No.3 has been used and there is no evidence to show that accused No.1 or 2 are having their own car like maruti van.

(xiii)For blue colour car, insurance was claimed as the same was burnt. Accused No.3 has signed application and he had also gone along with surveyor. The car thereafter was shifted in a lorry hired by accused No.3 to

Anand and it was kept in a motor guarage asking the guaragewala that they would take away the car on the next day. However, it was lying there in the guarage itself till CBI took prosecution witness at that guarage and found out the car. The samples collected on and from car were sent to analysis to FSL and report of analysis shows presence of inflammable substance in the sample from car sent to FSL.

(xiv)Huge cash amount and other documents like FDRs and Investment Certificates have been seized from accused Nos.1 & 2 and so monetary gain obtained by them because of utility of the post, may be in the nature of commission from the traders supplying valuable and other materials including grossery etc. for the use of temple and Bhojanshala or by siphoning the cash gifts offered, is proved. Recovery of cash amount from accused No.3 and ownership of two motor cars by accused No.3 etc. are sufficient circumstances and these circumstances are adding great strength to

the prosecution case as to the motive of crime. A person may not like one's removal from such a creamy and influential position/post.

(xv)Separation of accused Nos. 2 & 4 from Nadiad on the ground that they want to go to Ahmedabad or Zundal village is significant. One of the prosecution witnesses was informed that because of the telephonic talk from accused No.1 Narayan Shashtri, they want to go to Ahmedabad. However, the other witness was intimated that because of telephonic message, they will have to go to Zundal. When it is in evidence of PW Jatin Bhagat that on their return from Nadiad to Vadtal temple in an auto rickshaw, they had reached Vadtal at about 6.00 to 6.15 p.m. Considering the distance between Nadiad and Vadtal, accused Nos. 2 & 4 must have separated at any time after 5.00 p.m. or about 5.00 to 5.30 p.m. It was not possible for the prosecution to collect negative evidence as to the alleged visit of accused Nos. 2 & 4 either at

Ahmedabad or at Zundal.

(xvi)There is evidence in the form of section 27 panchanama whereby it is proved that accused No.5 had shown the place of murder in a particular room of Sant Niwas of Navli Gurukul. Till that time, nobody was knowing about the exact place where the deceased was done to death.

(xvii)None of the prosecution witnesses including Jatin Bhagat, Kinjal Joshi, Chiman and Nazirmiya should be condemned because their statements, if any, recorded earlier, then those statements recorded can not be said to be the statements under section 161 of CrPC because Chaklashi Police, Nadiad Town Police and thereafter CID Crime were simply inquiring about missing of Guru Gadadharanandji and no formal complaint of abduction was registered. So, those statements are found during fissy inquiry and an attempt to get clue of missing Guru Gadadharanandji. So, the contradictions brought on record in the nature of either an improvement or an

omission, can not be given any weightage, in view of the scheme of sections 161 & 162 of CrPC and the oral evidence, therefore, of all these witnesses can be evaluated accordingly.

(xviii)It is submitted by ld. APP Mr. Dave that the reference of having only one gate in the temple by witnesses, if evaluated closely, it appears that there are actually two main gates; one known as “Hanumanwala Darwaja” and other is the main entry gate through which a vehicle can enter the temple compound. There is open space outside the temple gate where there is some construction in the form of shopping centre and, therefore, it is said by one of the witnesses viz. PW 15 Nazirmiya that he is mainly playing drums in the temple and he also opens the gate known as “Hanumanwala Darwaja” early in the morning at about 4.00 a.m. and closes that gate after last “Aarti” in the temple. He also said that he sits on the otla of the temple. He has further said that he closes main gate at

about 11.00 a.m. and opens that gate at about 2.00 p.m. He sits on the otla just opposite the room of Guru Gadadharanandji. So, in this background, the evidence of prosecution witnesses should be appreciated.

(xix) The presence of PW 16 Chiman, PW 15 Nazirmiya in Vadtal temple and that too in the nearby area of the room of Guru Gadadharanandji was natural and there was no reason for the trial Court to discard the evidence of these witnesses as to the facts stated by them either in the examination-in-chief or during the cross-examination about the presence of accused No.3 at about 2.00 p.m. on 03.05.1998 in blue maruti car and the facts stated by PW Nazirmiya that he had seen Guru sitting in blue car with accused No.3 and car leaving temple.

For short, according to Mr. Dave, this is a case where the prosecution has successfully established the link between the circumstances

resulting in to a complete chain of circumstances and this chain is sufficient to link the accused with crime and to hold that the accused persons have committed crime as alleged by the prosecution. It is true that ld. Counsel Mr. Ravani appearing for CBI has indirectly conceded that the evidence is not that adequate qua accused No.4 Ghanshyam Prakashdas, but the Court should appreciate that all the accused persons are facing a charge of criminal conspiracy. One may have joined by even a fraction of second and only with a view to help the accused of the offence of conspiracy, even than, such an accused can still be held guilty irrespective of the nature of role played by him as co-conspirator.

(41)(i) In rare contingencies, the Courts of our country are asked and/or supposed to entertain and deal with the proceedings simultaneously as original proceedings as well as the appellate proceedings. In the background of XLI Report of Law Commission, we must examine the entire evidence by ourselves independent of Sessions Court's view while

dealing with a reference under section 366(1) of CrPC. As held by the Supreme Court in the case of **Subbaiah Ambalam v/s State of Tamil Nadu, AIR 1977 SC 2046,** we have to consider the evidence afresh and arrive at our independent findings with regard to the guilt of the accused and we should not dispose of the case in a casual manner. So, it is not possible to overlook the conclusions arrived at by the ld. Trial Judge, even in absence of any appeal against the order of conviction and sentence from the accused persons. Independent evaluation by the High Court means careful examination of all relevant material evidence.

(ii) In the case of **State of Tamil Nadu v/s Rajendran, 1999(8) SCC 679,** it is observed that when a reference is made to the High Court under section 366 of CrPC by the Sessions Judge on passing a death sentence, the High Court has to satisfy itself whether a case beyond reasonable doubt has been made out against the accused for infliction of extreme penalty of death. The proceedings before the High Court in such a case require reappraisal and reassessment

of the entire facts and law so that it may come to its own independent conclusion. In performing this duty, the High Court is bound to consider the merit of the case itself and has to examine entire evidence on record. The Apex Court commented that " in the instant case, the High Court, as a Court of appeal, failed to exercise its powers under section 386 of CrPC." In the present case before us, the accused have already preferred appeal against the conviction and sentence and our jurisdiction as an appellate Court is co-extensive with that of a trial Court in the matter of assessment, appraisal and appreciation of evidence and also to determine the disputed issues placed before us by the accused-convicts. In the decision in a case of **Rajan v/s State of M.P., 1999(6) SCC 29,** while remitting criminal appeal back to the High Court, the Supreme Court has observed that " in the interest of justice, we deem it necessary that appeal must be heard and disposed of afresh in accordance with law" saying that it can not be forgotten that the appellate Court's jurisdiction is found co-extensive with

that of the trial Court. The appellate Court and simultaneously the High Court dealing with reference under section 366 of CrPC, is required to deal with the decision under scrutiny from all material legal as well as factual angles. In other words, the appellate Court is authorized statutorily under the scheme of section 386 of CrPC as well as in view of the decision of the Apex Court wherein the Apex Court has appreciated the area of jurisdiction and commented on the obligation of the High Court dealing with confirmation case, to rewrite the entire judgment. While doing this exercise, the High Court can accept;-

(i)the reasons assigned by the trial Court stating how and why reasons assigned by the trial Court are found acceptable;

(ii)can show disinclination in accepting the reasons and/or ultimate finding arrived at by the trial Court;

(iii)may accept the ultimate finding, but by assigning other reasons in confirming the ultimate decision;

(iv)can agree partly with the reasons assigned by the ld. Trial Judge and add strength in confirming the ultimate finding or in partly modifying the ultimate finding.

(iii) It is not necessary to reproduce the scheme of section 386 of CrPC, but a plain reading of the entire provisions makes it clear that the same gives ample powers to the Court to even alter or amend the charge and there is a sharp difference in the powers in dealing with appeal against the conviction and acquittal. The Court dealing with confirmation case and/or appeal against the order of conviction or while dealing with both these proceedings simultaneously, is bound to peruse the record and to hear the accused/appellant or his pleader. The word “perusal” even puts the Court under a great legal obligation. Perusal can not be done cursorily. The Court is bound to go through the record itself and to decide the matter on its merits. “Mere perusal of the judgment appealled against is illegal” because

it is likely to result into some prejudice to either party resulting into miscarriage of justice. The appellate Court, therefore, can say that the order of conviction and sentence has written by the ld. Trial Judge is found with certain infirmities and error of law. Even then, the accused can still be held responsible and guilty of the offence for which he is charged or can be held guilty of any of such offences. Obviously, in such a situation, the decision of the High Court must have a sound base of good logical and legal reasons and the reasons should have foundation of legal evidence available on record. Obviously, therefore, the submissions made before us shall have to be dealt with accordingly.

(iv) While dealing with the reference under section 366 of CrPC, the strength in conclusion awarding capital punishment is to be tested by the High Court strictly in accordance with law laid down by the Apex Court. Justification of punishment if found based on sheer emotions or anger, displeasure or if it is found that the

idea to impose extreme penalty is only to deter, then also the High Court should try to ascertain the justification of the punishment imposed. Here before us, the legality and validity of the order of conviction is also challenged. So, the judgment before us needs all the treatment required.

(42) We have considered all the submissions and number of authorities cited by the ld. Counsel appearing for the parties. Before recording our reasons and ultimate finding, we would like to mention one important fact that though Mr. Ravani has cited certain decisions on the point of quantum of punishment, but neither ld. Counsel Mr. Ravani nor ld. APP Mr. Dave have attempted to convince this Court that the extreme penalty of hanging imposed by the ld. Trial Judge was the only adequate punishment and this case falls in the category of the rarest of the rare case wherein the death penalty can be said to be the only penalty that can be said to be sufficient from all angles. Considering the ratio of the various decisions, of course

the facts of each decision are materially different from each other, when the death penalty requires to be abolished comes up often as an issue of national debate, the ratio of the decisions of the Apex Court in the following cited decisions, according to us, shall have great impact on the present case;-

(i)Dhananjay Chatterjee @ Dhana V/s State of W.B., (1994) 2 SCC 220;

(ii)Manahar Lal alias Munna and another v/s The State (NTC of Delhi), AIR 2000 SC 4203;

(iii)Kishori v/s State (NTC) of Delhi, AIR 2000 SC 5623;

(iv)Machhi Singh and others v/s State of Punjab, AIR 1983 SC 9573;

(v)Ravji alias Ram Chandra v/s State of Rajasthan, 1996(3) GLR 2293;

Of course, in all the above-cited five decisions, the Apex Court has found the death penalty as an adequate penalty, but the observations made in the above paragraphs lay down a ratio and that ratio, according to us, is

not found applicable to the facts of the present case. The trial Court has decided to award the death penalty to five persons in a murder of a person who was taken out of the temple under, even as per the prosecution case, an enticement of the nature that which normally a sadhu or sanyasi would not think of.

(i) In **Dhananjoy Chatterjee @ Dhana Vs. State of W.B., (1994) 2 SCC 220**, while upholding the death sentence, the Supreme Court has made following pertinent observations:

> “The sordid episode of the security guard, whose sacred duty was to ensure the protection and welfare of the inhabitants of the flats in the apartment, should have subjected the deceased, a resident of one of the flats, to gratify his lust and murder her in retaliation for his transfer on her complaint, makes the crime even more heinous. Keeping in view the medical evidence and the state in which the body of the deceased

was found, it is obvious that a most heinous type of barbaric rape and murder was committed on a helpless and defenceless school-going girl of 18 years. The faith of the society by such a barbaric act of the guard, gets totally shaken and its cry for justice become loud and clear. The offence was not only inhuman and barbaric but it was a totally ruthless crime of rape followed by cold blooded murder and an affront to the human dignity of the society. The savage nature of the crime has shocked our judicial conscience. There are no extenuating or mitigating circumstances whatso-ever in the case. A real and abiding concern for the dignity of human life is required to be kept in mind by the courts while considering the confirmation of the sentence of death but a cold

> blooded pre-planned brutal murder, without any provocation, after committing rape on an innocent and defenceless young girl of 18 year, by the security guard certainly makes this case a “rarest of the rare” cases which calls for no punishment other than the capital punishment.”

(ii) In the decision of the Apex Court in the case of ***Manohar Lal alias Munna (supra),*** death penalty was not awarded. Referring to the case in the case of **Kishori v/s State (NTC) of Delhi (supra),** *in para 8, the Court has pointed out as under:-*

> " The normal sentence for murder is life imprisonment and death penalty is now reserved to be given in "rarest of the rare cases" in which the other sentence is unquestionably foreclosed. Thus death penalty is now sequestered to the narrowest region.

> What the appellants have done were no doubt acts of the most gruesome nature. But we bear in mind that they were on a rampage, and they ran berserk unguided by sense or reason and triggered only by a demented psyche.They had no special or personal animosity towards anyone of the deceased individually."

The Apex Court, considering the judgment in the case of ***Kishori (supra)*** in para-9, has indicated the guidelines by observing as under:-

> " When an amorphous group of persons come together, it cannot be said that they indulge in any systematic or organized activity. Such group may indulge in activities and may remain cohesive only for a temporary period and thereafter would disintegrate. The acts of the mob of which the appellant was a member cannot be stated to be the result of any organization or any group indulging

> in violent activities formed with any purpose or scheme so as to call an organized activity. In that sense, we may say that the acts of the mob of which the appellant was a member was only the result of a temporary frenzy."

(iii) In the case of ***Machhi Singh and others v. State of Punjab (supra)*** the Apex Court considered the question of imposing death sentence and provided guidelines in para 32. In paras 33 & 34, the Apex Court has observed as under:-

> "33. In this background the guidelines indicated in Bachan Singh's case (supra) will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentences arises. The following propositions emerge from Bachan Singh's case:
>
> (i) the extreme penalty of death need not be inflicted except in gravest cases of extreme culpability;

(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggraving and mitigating circumstances has to be drawn up and in doing so the mitigating

circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

34. In order to apply these guidelines inter-alia the following questions may be asked and answered:

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose deathsentence even after according maximum weightage to the mitigating circumstances which speak infavour of the offender ?"

(iv) In the case of ***Ravji @ Ram Chandra vs. State of Rajasthan (supra),*** the Apex Court,

in para 24, after considering the case of ***Dhananjoy Chatterjee v. State of W.B. (supra),*** held as under:-

> "In our view, in the facts of the case, it has been very clearly established that the appellant has committed one of the most heinous crimes of killing his poor wife who was in advance stage of pregnancy and three minor children for no fault on their part. The appellant had solvent duty too protect them and to maintain them, but he betrayed the trust reposed in him in a very cruel and calculated manner without any provocation whatsoever. The appellant did not even spare his mother who was very rightly trying to prevent him from committing such unpardonable crime. The appellant also attacked his mother with the axe which he had used to kill his wife and minor children and caused injuries on her person

with intention to kill her. Brutality and cruelty with which the crimes have been perpetrated cannot, but shock the conscience of the society. The crime had been committed with utmost cruelty and brutality without any provocation in a calculated manner. It is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriated punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting

> public abhorrence and it should "respond to the society's cry for justice against the criminal. In our view, if for such heinous crimes the most deterrent punishment for wanton and brutal murders is not given, the case of deterrent punishment will lose its relevance. We therefore, do not find any justification to commute the death penalty to imprisonment for life."

(43) In the case of **Padala Veera Reddy v/s State of AP & Others, 1991 SCC (Cri.)407,** and many other decisions where the case of the prosecution rests on circumstantial evidence, the Apex Court has said that the evidence led by the prosecution must satisfy the following major tests; viz

(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(ii) those circumstances should be of definite tendency unerringly pointing towards the

guilt of the accused or taking the case of prosecution further towards the guilt of the accused;

(iii) the circumstances taken cumulatively, if they are more than one, should form a chain so complete that there is no escape from any other conclusion that within all human probability, the crime was committed by the accused and none-else;

(iv) the circumstantial evidence, in order to sustain conviction, must be complete and incapable of explanation of any other hypothesis than that of the guilt of accused and such evidence should not only be consistent with the guilt of the accused, but should be inconsistent with his innocence.

(44) We would like to deal with the arguments issue-wise because the appellants have challenged the validity of the judgment and order of conviction and sentence practically on all issues and even it is submitted that there is no adequate evidence to show that the death

of the person found out by Bichchhuwada police was a homicidal death and that too on account of axpysia due to strangulation. They are:

(A) HOMICIDAL DEATH :

(i) The prosecution has mainly placed reliance to prove this aspect on the evidence led by PW 57 Dr. Rajkumar Gupta (Exh.268) who has performed post-mortem on the spot where the body was lying in a ditch at the outskirt of village Barothi. There is no serious dispute that Dr. Gupta who has performed post-mortem had gone to the spot to carry out autopsy at the instance of Bichchhuwada police on 4.05.1998 as it was not possible for Bichchhuwada police to take the dead body to concerned Community Health Centre at Bichchhuwada. The panchanama showing the position of the body lying on the earth and map prepared by Bichchhuwada police Exh. 252 & 253 respectively give an impression, vis-a-vis the condition of the dead body described, that a prudent man having sound reasons can infer that the death must not be an accidental death.

Only the expert, after performing post-mortem can opine whether the burns found on the dead body which practically was converted in a highly deshaped and decomposed condition creating a ghoastly & horrible look and glance at it would pass a tremour of fear through the body, are homicidal or suicidal burns and they were ante-mortem or not. Dr. Gupta has opined positively that the burns found on the body of the person lying dead and examined by him at the time of performing post-mortem, were not ante-mortem. We have described the injuries in earlier part of our judgment. The doctor has said that hyoid bone was found fractured and he has stated that the person must have struggled to save himself so that he can get out of the grip of the accused strangulating him by giving pressure on the neck. During the examination, Dr. Gupta narrated various possibilities and methods that are being adopted for throatling the neck so that a death can be caused due to axpysia. For short, the say of Dr. Gupta has stood to the test of cross-examination because the burn injuries on the neck found during

autopsy reveal that delicate bones including survical bones were there in the body and they were not destroyed or totally burnt and were found converted into heavily deshaped condition. The locations of the burn injuries found and the fact that the food taken by the deceased was also there in the stomach in a burnt and sold condition. In view of above, it would not be proper for us to infer that the fracture of hyoid bone may be because some other cause. It is true that the case of the prosecution is that the dead body was shifted to a place where it was found lying by PW Shankar Damor on 04.05.1998 and the same was shifted and must have been shifted in a vehicle. The doctor has opined that mishandling of a dead body may also result into such or similar fracture of hyoid bone. So, the fracture of hyoid bone noticed by Dr. Gupta could have been caused because of mishandling of the dead body, but the fracture of hyoid bone noticed by Dr. Gupta, whether was because of mishandling or rough handling of a dead body or for some other reason, if found assessable and inferable by the expert, the same

should be given weightage and Dr. Gupta's evidence on this point is clear. Because a person who sets himself on fire with a view to commit suicide and falls on earth and because of last minute's efforts to save one's self from fire which he himself had lighted on his own body, may get such or similar type of injury of fracture of a hyoid bone, if an imagination is stretched to this much extent, but then the burn injuries found on the person of the deceased would not look like and would not be post-mortem burns. So, the fracture of hyoid bone must have been caused in the present case prior to the infliction of burn injuries. A comment can be made that in the present case, the person who had set the body on fire, can not be said to have inflicted burn injuries because at the time of setting the body on fire, that person was already dead. So, the post-mortem injury of burns found on the body in all the cases, can be said to an act done after committing a punishable offence of murder with an ulterior motive, may be of destroying the evidence or misleading the investigating agency or both.

Dr. Gupta has examined the dead body from various angles. Tongue of the dead body was found out of mouth and it was also found burnt. Toes were found bluish and other parts were also found bluish. Shape of fingers were found similar which are normally found in case of strangulation. Right lung which was found half-burnt and incinerated, but the other half of that lung was congested and there were chocolate brown clots. Heart of the person deceased was healthy. Larynx and tracheae were capable of examination and they were found congested and black. No fracture of rib was noticed while examining, the right lung by Dr. Gupta. The brain and spinal cord were also examined. Brain was found congested and Dr. Gupta found that it is not necessary to open spinal cord as it was possible for him to conclude on the point as to the cause of death as it appears from the post-mortem notes exh.269 and his deposition. A serious dispute brought before us by ld. Sr. Counsel Mr. Thakkar is that notings in column-7 of Part-III of post-mortem notes exh.269 -examination of thorax- are totally contrary to

the opinion expressed by the experts in the field in the book of repute in the field of medical jurisprudence i.e. Modi's Medical Jurisprudence & Toxicology. In the present case, Dr. Gupta has noticed right chamber of the heart empty and left chamber of heart full of clotted blood. Attention of Dr. Gupta was drawn to the opinion expressed by the expert in the field and he was confronted with the Book qua the observations made by him in the post-mortem notes. The opinion expressed by Dr. Gupta whether should be accepted that death was due to strangulation, is a question posed before us. All other signs and symptoms noticed by Dr. Gupta including the position of lower limb flexed and upper limb all finger flexed i.e. the doctor found it as pugilistic attitude. The burnt condition of the tongue and fracture of hyoid bone etc. when were suggestive of death by strangulation vis-a-vis the condition of the brain and right chest found, then how much weightage should be given to the part of evidence brought on record by confronting the doctor showing him the Book – Modi's Medical

Jurisprudence & Toxicology, 23rd Edition, P.267), is the question posed. Doctor was asked to explain the contrary situation observed by the expert i.e. Author of the Book shown to him and Dr. has explained that how the contrary situation is possible. We have carefully gone through observations made by the Author of the Book and the same were also read over to us. We would like to reproduce two paras pointed out by Mr. Thakkar that was pointed out to Dr. Gupta also:-

> " It should be noted here that the hyoid bone and superior cornuae of the thyroid cartilage are not, as a rule, fractured by any other means other than by strangulation, although the larynx and the trachea may, in rare cases, be fractured by a fall. Postmortem fracture of the hyoid bone is characterized by the absence of haemorrhage in the tissues around the fracture. (relevant for the purpose of the present case)."

The lungs are usually markedly

congested, showing haemorrahagic patches and petechiae and exuding dark fluid blood on section. They may show emphysematous bullae on their surface due to over distention and rupture of the interalveolar septa. The bronchial tubes usually contains frothy, bloodstained mucus. The right side of the heart is full of dark fluid blood, and the left empty. The right ventricle is found contracted and empty like the left, if the heart had continued to beat after the stoppage of respiration. Sometimes, both the cavities are found full, if the heart stopped during diastole. The abdominal organs are darkly congested. The brain is also congested and shows petechial haemorrhages." (relevant for the purpose of the present case).

The plain reading of above paras clearly indicates that "if the heart had continued to beat after stoppage of respiration, is the

important time in the opinion expressed by the author of the book. So, the first part of the sentence expressing opinion is a qualified statement and the experts have also thought over other probabilities under which both the cavities are found full if the heart stops during diastole. In the background of the opinion expressed in above paras, it would not be either prudent or proper for us to say that the opinion expressed by Dr.Gupta as an expert is contrary to the proposition placed by the expert i.e. author of the Book referred to above. On the contrary, it is possible to visualize the working of heart-beating of heart and artificial obstruction or intervention in beating of a healthy human heart, may create various positions and at the time of accute stoppage of it's beating in a given circumstance, may be different than what is observed in large number of cases. Dr. Gupta has said that if an attempt to strangulate a person becomes successful after more than one attempt, than the contingency that he had noticed may occur, meaning thereby that the condition of the

heart noticed in the present case by Dr. Gupta was not totally contrary to or conflicting with the other observations qua the cause of death viz. axpysia due to strangulation, as noticed by Dr. Gupta. The condition of the heart found in the present case, is not capable of ruling out the death by axpysia due to strangulation. The death absolutely in the present case, was not natural because a dead person can not set himself on fire. Autopsy report rules out the possibility of natural death. Absence of rope or any other articles which the deceased could have used for strangulating himself vis-a-vis a post-mortem burns, rules out the case of suicide and an act of a stranger setting the dead body on fire. According to us, the symptoms found are suggestive of homicidal death. So, we are not accepting the say of ld. Sr.Counsel Mr. Thakkar that the prosecution has not proved the death as a homicidal death beyond doubt. We accordingly hold that the prosecution has successfully held that the death of the deceased person was not a suicidal death but was a homicidal death.

(B) IDENTITY OF THE DEAD BOODY :

(i) The prosecution has tried to establish that the dead body found and recovered by Bichchhuwada police on 04.05.1998 is of missing Guru Gadadharanandji. On appreciation of oral as well as documentary evidence led on this point, the deposition of PW-57 Dr. Rajkumar Gupta (exh.268) who himself has noticed two important aspects when he was requested to carry out post-mortem by Bichchhuwada police, is found important. Dr. Gupta has stated that at the time of carrying on post-mortem, he has found one key lying just near the dead body tied with cotton thread. Three teeth out of total 32 teeth of the denture of the deceased, were having golden cap. So, after carrying panchanma, he had taken out all the three golden caps from the teeth and they were handed over to police. In the same way, key was also handed over to police. It is also stated that he had drawn blood from the heart of the deceased and had collected two joints i.e. (i) elbow joint, and (ii) writ joint and these articles were handed over to

police in a glass container having 10% formaline so that the same can be preserved well. According to Dr. Gupta, he had addressed a letter so that the sample can be sent to FSL for analysis and all the samples including the key and golden caps were seized, tagged and sealed and the seal of his hospital was affixed on these articles. Dr. Gupta has identified a key shown to him as a key recovered which was lying near the dead body as well as muddamal article Nos. 11/4, 11/1 & 11/2. They are three golden caps of teeth and also identified the joints of the dead body which was given to Bichchhuwada police. The defence side has cross-examined this witness (Dr.Gupta) at length as to age and according to Dr. Gupta, the age of the person, according to his assessment, was having above 21 years. Of course, he had advised Bichchhuwada police to get x-ray done of elbow and wrist joint for exact determination of the age. We are not convinced with the arguments that considering the opinion of Dr.Gupta, the Court should hold that the dead body was of a young man because of the mention in the post-mortem

note that large part of the body was burnt, 100% burns were on the body and the skin was present only near the left upper limb. So, considering the joints taken out by Dr.Gupta, he has assessed the age above 21 years. It is an accepted proposition that after some years, no major change is found qua the joints of a human body. So, a person having age of 21 years, may be above 60 or 65 years, would have the same shape and function in joints. During the course of cross-examination of this witness, number of hypothetical questions were placed, but practically there is no cross-examination as to the procedure adopted by him in collecting the above said samples and their sealing. As the deceased had 32 teeth, age of the deceased was assessed as above 21 years. These numbers of teeth may be there in body of a person who is above 60, 65 or 70 years. It has come on record that he had mentioned the description of the key found and handed over to Bichchhuwada police. In the post-mortem note exh.269, there is a clear reference of the description as “key marked Tri Circle, China along with a thread”.

In remark column of the Medical Officer, it is also mentioned that elbow and writ joint for x-ray and analysis along with gold-plated teeth were handed over to police after post-mortem. The dead body was also handed over to Bichchhuwada police for proper disposal. Copy of the post-mortem note was sent to SHO, Bichchhuwada police station as well as Chief MO and H.O., DPR, wherein no doubt as to the genuineness of the post-mortem report and facts stated by the doctor qua his act of drawing samples and handing over those samples to Bichchhuwada police station in a sealed condition. PW Shankar Damor (Exh.248) has corroborated the say of the doctor whereby he has stated that the dead body seen by him was of a person male and doctor has examined the dead body on the spot. Many people had gathered there and a key made of brass tied in a thread was found lying near the dead body. He is the person who had signed panchanama drawn by the police exh.250. One Mangalabhai has also signed along with one other person. So, we have no hesitation in accepting this part of evidence

that the samples of the dead body found by Bichchhuwada police as well as a key found lying near the dead body were collected on 04.05.1998 and all those samples were handed over to Bichchhuwada police in a seal condition. According to us, the most relevant aspect qua the case placed by the prosecution is that Bichchhuwada police was not aware about missing of Guru Gadadharanandji from Vadtal temple premises. PSI Naransingh Harisingh Bhati-PW62 has also proved the panchanama exh.250 and recovery of a burnt piece of cloth smelling with diesel or petrol. The relevant muddamal article is also seen by us and that article and key allegedly found lying near the dead body looks black as if that article has remained in or with fire. According to Mr. Bhati, he had received muddamal in a sealed condition handed over to him by the doctor so that the same can be sent for analysis. It is stated that he had called one videographer from Bichchhuwada i.e. PW 20 Vasantkumar (exh.177) and the videography was made practically of all the procedure followed at the spot where the

dead body was lying and the post mortem was carried out. While making submissions, ld. Sr. Counsel Mr. Thakkar has fairly accepted that there is no need for the Court to watch video cassette because they had not disputed the recovery of a dead body and muddamal articles etc. Even for the sake of arguments it is accepted that there is no reference of “Tri Circle, China” in the case diary maintained by Mr. Bhati in reference to the key found and handed over to him by the doctor, would not make the recovery of the key doubtful or as to its look or description because on this point, the evidence of Dr. Gupta is available and the same is corroborated by the post-mortem note -exh.269. Undisputedly, the seal on the key was opened for the first time by the expert who has examined it along with two other muddamal keys from which the description of the key can be found, especially when the same was opened and shown to the witness during the trial. At one place, Mr. Thakkar has pointed out that while describing the key, only two circles are shown. We have given our look at all the three keys and

considering the evidence of recovery of all the three keys during the course of investigation, one by Bichchhuwada police and two by CBI from the prosecution witness Jatin Bhagat (PW 3, Exh.101). Muddamal key lying with Bichchhuwada police in turn was seized and taken over by CBI and thereafter, all the three keys were sent for test analysis along with lock having mark “Tri Circle, China”.

(ii) It is in evidence that the body parts of the deceased handed over to Bichchhuwada police were recovered and seized by CBI during investigation along with the file of inquiry conducted in respect of Inquiry No.3/1998 including the case diary containing page Nos. 1 to 30. The extracts of “Malkhana Register” having relevant entry made by Malkhana In-charge of the police station in Inquiry No.3/1998, were also recovered by CBI. The other part of panchanama has been proved by IO Mr. Krishikar and by panch witness Gautambhai (PW.30, Exh.187). Considering the panchanamas exh.192, 252 and 253, the same are found reliable pieces of documentary evidence. Without entering into

the merits of the allegations made against panch Gautam, according to us, recovery of muddamal articles by Bichchhuwada police of the parts of the dead body and recovery of a brass key having mark “Tri Circle, China”, is not found doubtful because the prosecution has remained consistent qua the recovery of these articles of muddamal having corroboration from documents exh.252 and 253 prepared and signed on 04.05.1998 by Bichchhuwada police. The dead body was disposed of after intimating informant PW Shankar Thavra Damor and one Fulshankar Somji Kokcha Meena that the body parts are taken out so that DNA fingerprinting can be carried out. This document is at exh.254. So, we have no reason to disbelieve the say of the prosecution that the body parts, three golden caps of the teeth and a brass key having mark “Tri Circle, China” were recovered by Bichchhuwada police and in turn it was handed over to CBI during the investigation of the present crime.

(iii) PW 2 Prafulchandra Dayashankar Mehta (exh.99) has stated that deceased

Gadadharanandji was maternal uncle of his wife Hemangini and Radiyatba was her maternal aunt. Radiyatba had died in the year 1999 and he had accompanied Radiyatba to Civil Hospital, Ahmedabad with his elder brother-in-law Avanti Narmadashankar Joshi. It is proved by this witness that necessary forms were filled in and he had signed that forms as P.D.Mehta. That the form was filled in as blood sample was to be taken for DNA fingerprinting. The photograph of Radiyatba was also affixed on the form. At one place, he had signed as witness and other signature in the form is of Avantibhai. The sample of blood of Radiyatba was drawn in his presence. She was above 95 years of age and she was the sister of Gadadharanandji. He was also shown two photographs of deceased Gadadharanandji available on record and this witness has identified the person seen in both the photographs wearing garland of yellow flowers, as Gadadharanandji. It has come on record in the cross- examination that Radiyatba is now no more and she had expired at Junagadh. It i stated by this witness that as she was to

be taken to the Civil Hospital for drawing one blood sample, she had come to his residence at Ahmedabad and Radiyatba as well as this witness were taken to Civil Hospital in a vehicle by CBI Officers. He has denied the allegation that he is not related either to Radiyatba or to Gadadharanandji. This witness has done post-graduation in Commerce and he appears to be a responsible person and according to us, we have no reason to discard his evidence as to drawing of a sample of blood from the body of Radiyatba. It was unfortunate that the prosecution was not able to examine Radiyatba as she had met with a natural death. It is true that the prosecution could have examined Hemangini, but this, according to us, is not a material infirmity or lacuna.

(iv) PW 4 Dr. Hemant Punjabhai Patel (Exh.109) is examined to prove the procedure followed by the investigating agency to draw the sample of blood from the body of Radiyatba- sister of deceased Gadadharanandji. At relevant point of time, PW Dr.Himmatbhai was serving in Civil Hospital,

Ahmedabad as Medical Officer since March 1989. After recording identification mark and obtaining her thumb impression on the case paper, this witness had drawn sample of blood from the body of Radiyatba. He has proved the necessary intimation received from Radiyatba addressed to hospital and also the case papers. These documents are at exh.110 & 111. He has also proved that how the sample was drawn and collected in a phial. It has come on record through the evidence of PW 60 Dr.VG Rao (exh.279) that once he had found sample received from analysis and DNA fingerprinting not useful, and therefore he called for a sample in a phial afresh. Dr. Himmatbhai has proved that he had drawn 5 cc blood with the help of disposable syringe and niddle and it was injected in a phial (vaccuety) brought by the police officer. Phial was closed and without opening it, the blood was injected in the phial with injection niddle and thereafter upper part of phial was tagged with a cotton and it was sealed by affixing his personal seal. He has affixed the label on the phial containing the

details as the name of Radiyatba, date, EPR No. etc. and phial was handed over to police with a forwarding letter. The forwarding letter after marking impression of the seal, was handed over to the police official. He had obtained receipt from the officer while handing over phial to him by obtaining endorsement in the papers. The witness was also shown the form along with photograph of Radiyatba. Of course, this witness was not able to identify the photograph because of lapse of time, but he has proved the document prepared while drawing sample and handing over to the police official and that document is at exh.122. The phial was handed over to one Mr. Kanhare. Document exh.111 was given to him by Mr. Kanhare. This witness has been cross-examined in detail and he had responded all the questions in satisfactory manner. It has come on record that he was having 13 years' experience and the blood was taken from the body of Radiyatba as observed by the expert as reflected in the book Modi's Medical Jurisprudence & Toxicology. He has denied that any preservative was added in the sample of

blood drawn. So, it has come on record that sample blood was poured into a phial given to the doctor and immediately thereafter it was sealed. No, dissatisfaction whatsoever is found to have been recorded by the expert Dr. Rao who has used this sample blood to carry out DNA fingerprinting with the body part of the deceased recovered from Bichchhuwada police and sent for analysis to this expert i.e. Dr.Rao by CBI. It has also come on record that PW Jatin Bhagat is a distant relative of deceased Gadadharanandji and in that way, Hemangini, w/o PW Prafulchandra Mehta and real brother of Hemangini who had accompanied PW Prafulchandra i.e. Avantibhai with Radiyatba when the sample of the blood was to be drawn from the body of Radiyatba, can be said to be a distant relative of deceased Gadadharanandji. There is no reason for the Court to disbelieve PW Prafulchandra Mehta that deceased Gadadharanandji was the maternal uncle of his wife Hemangini and Radiyatba was the maternal aunt and that way deceased Gadadharanandji was the brother of Radiyatba. Dr.Rao, in his deposition (exh.279)

has stated that the Centre for DNA Fingerprinting and Diagnostics (CDFD for short) has received in all 13 exhibits including 12 exhibits regarding different parts of human body and the blood sample of Radiyatba. Out of various parts of the body of the deceased, they could isolate DNA from four body parts, viz

(i)partially burnt elbow joint;
(ii)partially burnt wrist joint;
(iii)teeth and part of denture and pieces of bones from torso, and
(iv)blood sample of Radiyatba.

The rest of the articles were not found useful for the purpose of examination. This witness has proved the report exh.284. It is stated by this witness that this DNA fingerprinting test was carried out at the instance of CBI, Bombay and CDFD was requested to carry out identification of some parts of the body of a man (human being) vide letter dated 26.04.1999. This letter is at exh.273. This witness has also proved other documents which,

according to us, are not of much relevance. They are the documents at exh.274 & 280. They are letters and acknowledgment etc. between CBI and CDFD. It is stated by this witness that “along with this forwarding letter dated 13.03.1999, fresh blood sample of Radiyatba was sent for analysis.” Identification form of Radiyatba along with her photograph was also there. He has further stated that “along with this fresh blood sample and forwarding note and identification form, there was a letter of Dr. HF Patel. According to us, “F” is wrongly mentioned while recording deposition instead of “F”, “P” ought to have been written while recording the deposition. This is nothing but an error committed by subordinate staff who was recording the deposition of the doctor of Civil Hospital, Ahmedabad dated 13.05.1999 stating that the blood sample of Radiyatba is taken and handed over to Mr. RK Kanhare, PSI, CBI, Bombay, **sealed with the personal seal.** (emphasis for the purpose of present decision). According to Dr. Rao, the letter contained impression of the seal affixed on the blood sample. The samples

were received by CDFD in a sealed condition. It is argued that before opening the seal affixed on the sample of blood of Radiyatba, this witness has not compared the personal seal of Dr. Patel that was there on the forwarding letter. By showing one judgment of Allahabad High Court in Criminal Appeal No. 1000 of 2003 in the case of Dharam Deo Yadav v/s State of UP, ld. Sr. Counsel Mr. Thakkar has argued that the very witness once when was asked to depose before the Court, has categorically stated before the Court that he had compared the seal on the sample received for analysis. So, in absence of this statement on oath before the trial Court, this Court should hold that in absence of this clear cut evidence that the seal affixed on the blood sample of Radiyatba was compared with a specimen seal, no reliance can be placed on the finding recorded by Dr. Rao, because it would be risky to accept the report in absence of any statutory rule or mandatory type of direction issued by any regulating authority. It is the duty of the expert to compare the seal before using the

sample for analysis and when Dr. Rao has not stated in his deposition that he had compared the seal before using the blood sample of Radiyatba for DNA Fingerprinting, the Court should hold that the sample used for analysis may not be the same sent by Dr. Patel from Ahmedabad. In the blood sample, in the rarest of the rare case, similar DNF Fingerprinting is possible. So, the evidence given by Dr. Rao should be treated as useful in establishing the link as to the identification of the dead body found by Bichchhuwada police. We have carefully gone through para-29 of the above-cited decision pointed out by ld. Sr. Counsel Mr. Thakkar. It is true that a sentence more could have added some additional strength in the say of Dr. Rao, but it would not go to the root of the strength of the opinion expressed by Dr. Rao as an expert. We are not impressed also by the argument of Mr. Thakkar that as Dr. Rao was facing suspension on account of some prosecution instituted against him in one matrimonial dispute or family dispute, the same would make his version doubtful or untrustworthy.

Deposition of Dr. Rao before the Court is totally in different capacity and in different status and he was not even deposing in a case where matrimonial dispute is involved like child custody, matter of legitimacy of child etc. Dr. Rao, in his report exh.284 has observed that the sources of exh. B, C, G, H & J i.e. two joints, heap part, pieces of bones from torso and a stone containing blood mentioned in the report, is one and same human-male individual. The second finding recorded by Dr. Rao is that the sources of exh. B, C, G, H and J are biologically related to the sources of exh.M which is a blood sample of Radiyatba. Dr. Rao has also proved page-3 of his report exh.284 which contains photographs of the result obtained by him during the test analysis and the photographs contained 10 areas of DNA examination of exh. D & M. Dr. Rao is M.Sc. in Forensic Science and criminology. He has been awarded Ph.D in Forensic aspects of DNA Fingerprinting in the year 1993 and he has also done post-Doctorate in the same subjects up to 1996. Dr. Rao has experience of about 14 years

in the examination of crime samples pertaining to DNA Fingerprinting and he has examined about 1300 cases pertaining to DNA Fingerprinting and has given his opinion in those cases. We have carefully gone through the cross-examination of this witness. We would like to reproduce one answer given by Dr. Rao to the ld. Counsel appearing for accused No.1 because on the strength of this answer, it is being argued that the blood allegedly collected from the body of Radiyatba was not capable of use in carrying out DNA Fingerprinting. The said answer is;-

> “This may be because it might not have been put in ice. Secondly, it might not have been contained proper preservative. If the blood sample is not added with preservative and it is not put in ice, then so long as it is not coagulated, it remains useful for DNA Analysis. The coagulation of the blood varies form person to person so far as time factor is concerned. Maximum time for coagulation of blood is 30 minutes.”

However, Dr. Rao has further deposed that “if the blood is spread on any surface, then after some time it dries and become stained. From the stains, according to my knowledge, even up to 8 years, we can isolate DNA.” This answer of Dr.Rao brushes aside the arguments based on the cross-examination of this witness as well as of Dr. Himmatbhai Patel, made by the defence counsel. Undisputedly, the sample was sent by CBI to CDFD for analysis with necessary requirements and querries. For the sake of arguments even it is accepted that there was no scientific evidence as to the drawing of blood sample from Radiyatba, then also it was possible for CBI to infer that there must be some relation between the person who was found dead and the person whose blood was sent for analysis. The absence of statutory rules as to drawing of sample would not make much difference in the matter because if the sample is even old by about 7 to 8 years, scientifically can be used for DNA Fingerprinting and, therefore only, in western and developed countries, respective

governments or Crime Investigating Agencies are capable of keeping DNA Fingerprinting Data and Bank of such samples. Mr. Thakkar has attempted to read some rules before this Court framed by regulating authority in one of the developed countries, but such rules are not found useful to us because such rules could help our government if samples of hardened criminals are to be maintained and preserved for DNA Fingerprinting so that it can help in detection of crime and involvement of criminals on the basis of DNA Fingerprinting analysis from collected samples.

(v) DNA Fingerprinting technology is so advanced that even if the blood is disintegrated, DNA remains stable unless it is burnt by fire. The scope of error in DNA Fingerprinting including mal-functioning of instruments, human error or use of chemicals beyond expiry date, is 1 : 32 Billion. It is true that identity of a person deceased also can be established with superimposition techniques as observed by the Apex Court in the case of **Hennery West Muller**

v/s State of Rajasthan, 1985(3) SCC 201. In the present case, Bichchhuwada police was not aware about any formal complaint or report about missing of a person or photographs of the deceased in light of the condition of the dead body found, SHO had taken decision to dispose of the body and it was cremated there on that very spot where the post-mortem was performed. When Investigating Agency came into motion, the dead body was not there viz. was disposed of/cremated and so it was not possible for CBI to use that technique. So, according to us, the method adopted for carrying out the test, would not be a matter of much relevance as more than one sample of the dead body and stains of blood found on the stone were collected from the dead body and nearby place, which were capable of and sufficient for isolation of DNA Fingerprinting. Though there is no serious dispute as to the sealing process of muddamal articles collected from the dead body and taken out by Dr. Gupta after post-mortem, these muddamal articles were sent for DNA Fingerprinting Test and thereafter they were brought before the trial Court. To

doubt the sample examined and analysed for the purpose of DNA Fingerprinting Test in the present case, was drawn from or is of some other body (i.e. Radiyatba) altogether then the body located by PW Shankar Damor which was once the subject matter of inquiry by Bichchhuwada police, would be nothing but straching the logic under an imagination because the say of the expert is that both the bodies i.e. dead body and a body from which blood sample was drawn, are of the persons biogically related. The body parts collected by Dr. Gupta and handed over to Bichchhuwada police have been described by him and parts of that very description were received for analysis by CBI Team and when received by CDFD they were in a sealed condition, as reflected in the acknowledgment letter exh.280 sent by Dr. Rao, we are not inclined to doubt the finding recorded by Dr. Rao observing that in absence of positive statement on oath about (as there was no) comparison of seal before carrying out the DNA Fingerprinting test, the findings recorded by Dr. Rao can not legally be looked into, and no

comparison has been done. This fact, which could have been stated by him during his oral examination, has come on record indirectly and also in the form of correspondence exh.280, 281, 282 and 283. According to us, the report produced by Dr. Rao Exh.284 and the details contained therein, is an important and a relevant document. Hypothetically, if it is accepted for the sake of arguments that exh.M used for DNA Fingerprinting i.e. blood was of a person “A”, even then, it is clear from the finding recorded by Dr. Rao that the sources of exh.B, C, G, H & J belong to one male human individual and was found in biological relation with the blood sample drawn for comparison as sought. When it is said by PW Prafulchandra that the blood taken out and sealed was of Radiyatba, and she was a sister of deceased Gadadharanandji, then we have no reason to disbelieve the version of the prosecution. On the contrary, the finding recorded by Dr. Rao corroborates oral say of PW Prafulchandra Mehta that Radiyatba was the sister of deceased Gadadharanandji and, therefore, it was found

that there are biological relations between the persons whose blood was taken out and sent for comparison and analysis as sought and the deceased.

(vi) Exh.G analyzed by Dr. Rao was teeth and part of a denture and it was also found of the same male person as mentioned earlier. So, this part of evidence led by the prosecution is found sufficient to establish the identity viz. the dead body found by Bichchhuwada police was of a person biologically related to Radiyatba and was that of Gadadharanandji.

(vii) We have discussed in earlier paras, some part of the evidence led by prosecution in reference to the key found by Dr. Gupta and handed over to Bichchhuwada police in presence of panchas. Of course, some confusion has been created by the deposition of Mr. Krishikar-IO, but the plain reading of oral evidence as well as the seizure memo prepared in the presence of panchas qua the keys of the lock having mark “Tri Circle, China” reveals that only three

keys were there and all the three keys have been recovered during the course of investigation. It is clear that at one place, one key has been described as an iron key and it is also described that key was having two circles and that two circles are mentioned as “00”. It is not written in words “two circles”. Therefore only, we have seen all the three keys and it emerges that a key found lying near the body tied with a thread has some sign indicative of presence of thread or any other obstacle on upper portion of key and, therefore, that upper part of the key hole looked slightly different than other black-burnt portion of that very key (giving an impression that that portion was tied with some article like thread). It apparently looked as black burnt key and so one may commit a mistake in identifying the metal of the said key. It does not look like a key made from brass. The two other keys recovered during investigation and produced before the Court as muddamal have similar look and mark “Tri Circle, China”. Look of both these keys on both the side appears to be different viz. from one side

they look as if made of brass metal and from other side, they look as if made of stainless steel, because of electroplating. The expert who has examined these keys along with muddamal lock bearing mark “Tri Circle, China” has recorded the following finding:-

> “ Laboratory examination of Exh.2 & 3 reveals that the lock marked exh.2 can be opened with the key mark exh.3”.

It is also recorded in reference to querry Nos. 2, 3 & 4 raised by the investigating agency that “ on physical and microscopic examination of the key marked exh.1 & 3, the key exh.3 is similar in size, shape and marking to the pair of the keys exh.1.” This expert i.e. PW Chandrakumar Jain has been examined at Exh.141. At relevant point of time, he was Senior Scientific Officer in Central Forensic Science Laboratory (CFSL for short) and since 1984, he has examined various samples and has given deposition in more than 100 court cases. He has narrated the details of the samples received by him. CFSL had received three sealed paper

parcels, one was containing a pair of metal keys bearing mark “Tri Circle, China” on one side. The second parcel was containing one black coloured metallic lock with mark “Tri Circle, Made in China” on one side and hardened on the upper steel portion. Third parcel was containing one metallic key with mark “Tri Circle, China” on one side and it was described as recovered by Bichchhuwada police. These articles were given exh.1, 2 & 3 respectively. So, the pair of keys was given exh.1. Forwarding letter exh.143 describes these muddamal articles in details and this letter has been proved during the course of examination of expert PW Chandrakumar Jain. The query by CBI is a part of the document exh.143. It is important to note that exh.3- one metallic key bearing mark as “Tri circle” sealed in cotton cloth bearing paper chit of Bichchhuwada police station dated 04.05.1998 with Mark No.3 of 1998 under section 174 of CrPC signed by panchas which also bears specimen seal impression with which it was signed. So, it is clear from this document that one key collected and sealed by Bichchhuwada police had remained

in a sealed condition even at the time when it had reached to CFSL. We are not impressed by the arguments of Mr. Thakkar that the confusion as to the description of key at one place in one of the seizure memo has two circles i.e. “OO” and confusion as to number of total keys collected, would take this part of evidence under a shadow of cloud. We are also not able to accept the arguments that though asked specifically by CBI, CFSL was not able to opine as to metallic components of the key that was recovered by Bichchhuwada police from the spot where the dead body of the deceased was lying, in comparison to the pair of keys seized by CBI during investigation, would go against the prosecution. It is the say of the expert, in reference to the examination of metallic components is concerned, “facilities do not exist at present to determine the elemental composition. Hence, no opinion is offered regarding metallic components.” So, none of these three keys were taken for determination of elemental components. In absence of any positive contrary finding, the opinion expressed

qua querry Nos.1, 2 & 4, according to us, is sufficient to say that the key recovered by Bichchhuwada police was of the very same lock that was received by CFSL with parcel No.2 i.e. lock bearing mark “Tri Circle- Made in China”. According to us, reading recorded qua query No.4 would be very relevant and blackish external look of the key recovered by Bichchhuwada police thus would not make the identification of that key doubtful. Query No.4 raised by CBI was whether the marking “ Tri Circle China” are exactly the same as found on the pair of keys marked as “TK” ? **Reading says that key marked exh.3 (recovered by Bichchhuwada police) is similar in size, shape and marking to the pair of keys marked exh.1. (emphasis supplied for the purpose of present judgment).** We agree that the duplicate key of separate metal can be prepared, but in such cases, normally, only lever marks i.e. cuttings on the keys would be similar, but not the shape, size and marking unless it is obtained as an additional key from the company itself. Recovery of this key by Bichchhuwada police is genuine recovery because there was no

reason either for Dr. Gupta or for Bichchhuwada police to play any role in any of the offences. These officials might not have even thought of any blackmailing by CBI or superior officers in future as asked by Mr. Thakkar. Videography is showing the presence of the key. Over and above this aspect, gold ring mark found by doctors also tallies with the description of the ornaments that were being put on by the missing Guru Gadadharanandji. For short, this part of evidence also is good and substantive piece of evidence to establish the identity. It is there in evidence that the lock recovered and sent for analysis to CFSL was the same which was applied on the room/residence of the deceased Gadadharanandji and that very lock was found applied at the room/residence of Gadadharanandji when PW Jatin Bhagat and PW Kinjal Joshi returned from Nadiad after attending the function at the place of Durgesh Bhatt and during investigation it has been recovered by CBI. The investigating agency if has placed anything wrong qua the lock which was being regularly applied on the room of

Gadadharanandji, then key recovered by Bichchhuwada police in the month of May 1998 would not have been found applicable to that lock recovered in the year 1999.

(viii) Regarding third part of evidence to establish the identity of the dead body, CBI has collected evidence as to the denture of the deceased Gadadharanandji. Focusing on three different golden clips/caps of teeth found during the post-mortem and recovered by Bichchhuwada police, as discussed earlier, Dr. Gupta has taken out all the three golden clips/caps after performance of post-mortem by him and the same was seized on the spot in presence of panchas and recovery part of these three golden clips/caps or teeth is found genuine and we have no reason to doubt. On the contrary, the arguments advanced before us impliedly suggest that even the accused persons are relying on the recovery of these three golden clips by Dr. Gupta to disprove the allegation. In this fact situation, obviously, we shall have to appreciate the evidence

available on record. Evidence of PW 1 Dr. Upen Diwanji, in the background of evidence given by Dr. Gupta, is more relevant. Documents Exh.95 & 98 have created some confusion if these two documents are considered vis-a-vis the evidence of IO Mr. Krishikar. PW 1 Dr. Upen Diwanji in his deposition exh.94 has deposed that any patient when comes to his dispensary for treatment, case papers of such patient containing his name, address etc. are being prepared and the same are being prepared by his staff member. That if recovery of any fees is made, the same is also being noted in the Account Book. According to Dr. Diwanji, on 30.03.1993, one Gajanand Maharaj, Add: Vadtal Temple came to his Dental Clinic for the treatment complaining pain. After examining him, two teeth, i.e. first pre-moller on right upper jaw and the second one was second moller of left lower jaw and on 30.03.1993, he take out aforesaid two teeth. Thereafter, on 18.05.1993, this very patient had come to get fixed right upper pri-moller tooth and also to get denture prepared and fixed for 2nd Moller. Thereafter,

on 25.05.1993, he had fixed first pre-moller on right upper jaw and also settled the denture of second pre-moller. According to Dr. Diwanji, while fixing the first pre-moller, he fixed cap to get support from adjoining teeth. Teeth cap/clip was golden cap/clip. Thereafter, that patient has not come to him for any further treatment. He has accepted in his cross-examination that he has not mentioned specifically in the case papers about the fixation of golden metallic cap to this patient. There is confusion as to the name of the patient in his evidence. He has also accepted that the name of the patient treated by him was Gajanand and not Gadadharanandji. On careful consideration of the documents tendered in evidence i.e. exh.95, 96, 97 and 98, it is clear that there is material contradiction as to the number of teeth mentioned in the documents exh.95 & 98. Exh.96 is nothing but entry in the accounts for recovery of Rs.44/-. Dr. Diwanji was not to charge the patient, but on the insistence of the patient, above amount was recovered and, therefore, it is mentioned. Entry

of receipt of Rs.44/- is at the bottom i.e. is the last entry. The first and last entry in the register of account book requires close scrutiny and for that the Court normally should look to the original register and we have seen the original register from the record of the lower Court. Entry does not look doubtful so far as recovery of Rs.44/- is concerned. But the contradiction as to number of teeth mentioned in the documents exh.95 & 98 gives an impression that some over-doing probably has been made by the investigating agency. We are surprised why original case papers were not recovered in such a serious case and why Dr. Diwanji was asked to prepare copy like the original and that copy is recovered. Such a strange stand normally should not be taken. It emerges from the document exh.95 that on 18.05.1993, the patient was treated for Imp (impression) teeth Nos.6,5,4 and fitting was made on 25.05.1993 and the document tendered in evidence during the course of cross-examination from very witness i.e. exh.98, reveals that the patient was treated for teeth Nos.5,4,3. There is no contradiction as to the

total number of teeth mentioned in the treatment given on 30.03.1993. It is mentioned thus:-

30/3 4 /
_____/_____ Ext.
/ 7
/

However, while describing the treatment given on 18.05.1993, it is mentioned in Exh.95, thus;

18/5 654 /
_____/_____ Imp. for Br.
/ 7 P.D.
/

In Exh.98, for the treatment given on 18.05.1993, it is shown thus;

18/5 543 /
_____/_____ Imp. for Br.
/ 7 P.D.
/

In Exh.98, for the treatment given on 25.05.1993, it is written thus;

25/5 D.D. &
Br.Fitting.

Exh.95 does not bear the signature of the doctor, but Exh.98 does. There is material

improvement in the column of address of the patient and there is material contradiction in the column of the age of the patient. Document exh.95, according to us, is not found trustworthy in absence of original when it was possible for the CBI to seize the original. Here, we would like to mention certain details noted by PW Dr.Gupta (Exh.268). While, performing post-mortem, Dr. Gupta found golden clips/caps on three teeth i.e. teeth Nos. 6,5 & 4 and the same is mentioned as golden cap of three teeth right side upper division. While describing these details, Dr. Gupta has mentioned in the post-mortem notes as thus:-

Denture :	8 / 8 ____/___ 8/ 8 /	Right Side upper (6)(5)(4) on 6,5, 4 Teeth there is golden cap

Dr.Gupta has mentioned in para-8 of his deposition that he had handed over teeth having golden cap to the police along with key after post-mortem. There is no cross-examination on this part of the deposition of this witness. Now, Dr. Rao has said that some part of denture

was received by him as one of the articles along with other parts of the body of the deceased for DNA Fingerprinting. Teeth part of the denture was given Exh.G. It appears to us that only with a view to tally with numbers of teeth mentioned in post-mortem notes, the IO, instead of seizing the original case papers, had tried to obtain copy of original case papers so that necessary improvements can be made. Dr. Diwanji ought not to have co-operated CBI officials in altering the number. We are not convinced that in absence of original exh.98, no weightage should be given to zerox copy produced and tendered during the course of cross-examination to Dr. Diwanji. We are surprised how the original case papers without the help of either CBI or Dr. Diwanji, could reach to one of the accused. During the course of arguments, we had expressed our anxiety to know that if zerox copy is really supplied by CBI, then in how many bunch of copies of chargesheet papers such zerox copy of the document like exh. 98,was found. Mr. Thakkar has responded that the exh.98 was found in only one

of the bunch of chargesheet papers. It is not there even in the bunch of papers supplied to the Court. This answer has taken us to lot of surprise especially when IO Mr. Krishikar has stated in his deposition (para023) that document exh.98- case papers of Dr. Diwanji- were seized by him. He also stated that he had also seized document exh.95 as case papers of Dr. Diwanji prepared while treating his patient Gajanand Maharaj and it is the treatment card. In the very paragraph, attention of IO Mr. Krishikar was drawn to the aspects stated in Exh.95 & 98 inconsistent with each other. Thereafter, he has stated that “it is not true that he had seized case papers exh.98 first”. He had added voluntarily after answering the question that he had seized treatment card exh.95 first. He has denied that initially he had seized original case papers of exh.98, but as the details of it were not supporting the case of the prosecution, he obtained treatment card exh.95 from Dr. Diwanji. It was suggested to this witness i.e. IO Mr. Krishikar by the defence counsel that this Gadadharanandji had never taken treatment

from Dr. Diwanji and even than he had obtained concocted evidence so that it can be shown that deceased Gadadharanandji had taken treatment from Dr. Diwanji. As observed earlier, CBI ought to have put the facts as they were available with Dr. Diwanji. The answer given by IO Mr. Krishikar to the question posed by ld. Counsel appearing for accused No.1,it appears, is not strictly in accordance with the papers collected during the course of investigation and there was no need to get the instant document prepared like exh.95 because Dr. Diwanji has categorically stated in his deposition that exh.95 was prepared at the instance of IO from the original case papers lying with him. We have carefully considered the question posed to Dr. Diwanji by the ld. Counsel appearing for accused No.1 especially recorded in paras- 4 to 6 of his deposition when Dr. Diwanji has answered to one of the questions recorded in para-6 of his deposition that because of mistake, in exh.95, instead of 3,4,5, he has mentioned 4,5,6 and that he has mentioned 6,5,4 in Exh.98. So, impliedly Dr. Diwanji has accepted that number

of teeth mentioned in exh.95 is an error and it is not the correct description of number of teeth treated by him.

(ix) When the fairness of the investigating agency has been seriously assailed before us, we would like to mention that CBI ought to have recovered the original case papers or the zerox copies of the originals directing the doctor to keep the original case papers with him in safe-custody with instructions to bring the same if called by the Court for giving evidence. The question now before us is that what would be the effect of this overdoing by the investigating agency in reference to the identity of the dead body?

(ix-A) While appreciating the evidence, the Courts are supposed to lift the grains from chaff, if it is legally possible. The court can accept reliable part of evidence and discard the evidence which is not collected properly or sounds untrustworthy. So, it is possible for the Court to ignore the document exh.95 as an

unreliable document. On the contrary, it is clear from the deposition of Dr. Diwanji as well as from document exh.98 that three teeth were given fixed golden cap. Two were given golden cap only with a view to get support for the teeth which was actually treated. So, the conflict as to the number of teeth treated by Dr. Diwanji with number of teeth mentioned in the post-mortem note, has created some confused situation, but we are not able to accept the arguments of ld. Sr.Counsel Mr. Thakkar that it disproves the allegation as to the identity of the dead body found by Bichchhuwada police was of deceased Gadadharanandji or of the person who was treated by Dr. Diwanji or that the said dead body was of somebody who was having golden teeth clips over teeth Nos.6,5,4 of right upper jaw, because according to us, the document exh.98 has been brought on record by the defence counsel and that too during the course of cross-examination of Dr. Upen Diwanji. Dr. Diwanji has not challenged the genuineness of the existence of original of the document exh.98. It is not the say of Dr. Diwanji that

exh.98 is not genuine. On the contrary, it bears handwritings of Dr. Diwanji himself. IO Mr. Krishikar, as mentioned earlier, has accepted that he had at least seen the original of exh98 and also seized. It appears from his evidence that he was not sure whether he had actually seized the original of the document exh.98 or not. Without entering into further discussion as to the actual seizure of the original document exh.98 was made or not, it is legally possible for us to infer that exh.98 is more genuine and trustworthy document so far as treatment given to the patient mentioned in the case papers is concerned. Dr. Diwanji has stated that it would not be possible for him to identify the patient from the photograph of that patient if shown. So, the first possibility is that the case papers seized by CBI were not of Gadadharanandji, but was of somebody and if it was of Gadadharanandji and some error is committed in writing the name of the patient, then the number of teeth that were fixed golden cap, were teeth Nos.5,4,3 of right upper jaw. Unfortunately, Dr. Diwanji was not asked to

respond to any specific question by showing golden clip/cap and it was possible for him as a Dentist to assess exactly about the number of teeth because the shape of teeth and the angle etc. sometimes are capable of giving a clue on the point. The muddamal clips/caps were before the Court during trial, but the clips handed over to Bichchhuwada police who kept them in a sealed condition, were sent for analysis (exh.G) and as mentioned by us earlier, Dr. Rao was able to say that DNA isolated from that sample exh.G, was of some male human individual whose other parts of body were received by him for DNA Fingerprinting. Dr. Gupta was also not shown the golden teeth clip/cap so as to opine as to the number of teeth, if he is able to answer that question.

(x) The condition of the dead body was in a typical state lying in a ditch in a hopelessly burnt and horrified condition and, therefore, Dr. Gupta was requested to perform post-mortem on the spot. So, while describing number of teeth in the post-mortem note, he might have

committed some error while writing number of teeth and taken out by him along with golden clips/caps so that it can be sent with other parts of body for DNA Fingerprinting. This situation has taken us to ascertain whether it is possible to locate any golden teeth from the photograph of the deceased shown to more than one witnesses namely PW 2 Prafulchandra Mehta (exh.99) and PW 3 Jatin Bhagat (exh.101). Two photographs are available on record being mark 25/2 and the witnesses have identified that these two photographs are that of deceased Gadadharanandji. Considering the relations of these two witnesses with deceased Gadadharanandji, the Court can accept their version because they were competent to identify the deceased without mistake. The photographs are of postcard size and a person in the photograph is clearly seen and it is a sole photograph of that person. With normal eyes, we are able to locate the golden teeth of the person in the said photographs. However, to be more precise and exact, we have used magnifying glass for the purpose and without hesitation, it

is possible for us to record that the person in the photograph was having golden clip/cap on the teeth of right upper jaw.

(xi) A serious dispute is raised before us and it is challenged that the Court can not appreciate the photograph because the identification of a person through photograph is neither legal nor proper or safe. Even the trial Court ought not to have permitted the prosecutor in doing so and it would be illegal and risky for the Court to use this photographs for any purpose. It is true that the Apex Court in the case of **Kartarsingh v/s State of Punjab, (1994) 3 SCC 569 (= AIR 1995 SC 1726),** while appreciating the provision of relevant section of TADA has held that identification by photographs is not legal and the relevant provisions have been held ultra vires by the Apex Court. As per the settled legal position, an attempt to establish the identity of the accused through photograph meaning thereby by showing the photographs to witnesses has never been accepted as legal and satisfactory provision and showing of photograph as

substitute of TI parade has been held bad. However, the person deceased or missing can be identified on the strength of the photograph otherwise after destruction of the body or non-availability of the corpus of the person missing or dead, the closest relative also would not be able to say legally that the photograph shown to him by either the investigating agency of the prosecutor is of a person for whom grievance has been placed in the nature of complaint. Kith, kin and close relatives can positively say that the photograph shown is of a particular person known to them. No illegality has been committed during trial in showing the photographs of the deceased Gadadharanandji collected during the course of evidence from the competent witness and shown to more than one witness to establish the identity of a person seen in the photographs marks 25/1 & 25/2 (exh.102). If that photographs reveal that the person seen in the photograph was having golden teeth in right upper jaw, then the number mentioned either correctly or incorrectly in the post-mortem notes, would not make any material

difference in the background of DNA Fingerprinting result and the Court can safely infer that Gadadharanandji was having golden cap/clip on the teeth of his right upper jaw and the dead body found by Bichchhuwada police was also of a person having golden clip of teeth of right upper jaw of the deceased. So, the fact as to the conflict as to number of teeth in exh.95 & 98 pointed out to us by Mr. Thakkar, along with the nature of evidence given by IO Mr. Krishikar in this regard, would not make much difference. Here, we would like to say that the ld. Trial Judge ought not to have given exhibit to the photographs shown to PW Prafulchandra Mehta and PW Jatin Bhagat and identified by both these witnesses as photographs of deceased Gadadharanandji. Formal exercise of giving exhibit to the document, if has not been done by the trial Court, would not disentitle us to consider these photographs for the purpose of identification of the deceased in the photographs of deceased Gadadharanandji who has been described as a person putting on a garland of yellow flowers.

(xii) In the decision in the case of Kartarsingh (supra), the Apex Court was testing the vires of relevant provisions made in TADA authorizing the investigating agency to use the photographs while collecting the evidence as to the identity of the accused. The provisions, practically were substituting the formalities to get the accused identified by witnesses by carrying out TI Parade before the Executive Magistrate. Of course, the issue as to identification of the accused with the help of the photographs was before the Apex Court in the case of Navjot Singh Sandhu (supra). The relevant paras 226, 227 and 228 of the said decision are also considered by us. According to us, the evidence as to identification of a dead person which has come on record through the photographs can be used as substantive piece of evidence and/or use this evidence as corroborative piece of other evidence available on record.

(xiii) One observation made by Delhi High Court in the case of Raj Bahadur (1996 CrLJ 2364) would help the prosecution because in this decision, dead body was not even found by the investigating agency allegedly killed. Delhi High Court, placing reliance on the observations made by the Apex Court in the case of **Ram Chandra and another v/s State of UP, AIR 1957 SC 381,** has observed that “thus, if the contention of the ld. Counsel is accepted, in that eventuality, it would be difficult to prove the cases where the dead bodies having destroyed and as such are not traceable. To hold so, would be against the spirit of criminal law. Thus, to substantiate the case of the prosecution, we think it is not required that dead body must have been made available for identification by the relatives, if the prosecution witnesses are otherwise in a position to prove the guilt of the accused.” For short, it is not necessarily dependent upon the corpus delicti are not traceable. There may not be any reliable evidence -direct or circumstantial. Here in the present case, deshaped and burnt body was found

and prosecution has tried to establish the link between the person missing and dead body found alleging that the dead body is of the person who is reported to be missing since 03.05.1998 and the dead body was located on 04.05.1998 at a distance of some 100 kms. From the place where the deceased was last seen. So, in the event of even absence of corpus, the prosecution could have established that missing Guru Gadadharanandji is murdered.

(xiv) We should have passed some comments on one eventuality that has come to our notice viz. one of the accused in a surprising situation was able to get a copy of the original case papers whether seen a light of the day for the first time in reference to the investigation of the crime registered by CBI in the present case, otherwise it may not be lying in un-attended old record of Dr. Upen Diwanji. But as implied by producing the documents exh.98, the other side has accepted that the deceased was having golden cap over three teeth and the lacuna of not posing definite question to either Dr.

Diwanji or to Dr. Gupta as to the number of teeth by showing muddamal cap, wold not make this part of evidence either weak or useless.

(xv) In respect of one crucial circumstance i.e. “last seen in the company of the accused”, the prosecution has led evidence that the deceased Gadadharanandji was the chairman of the Temple Board to the satisfaction of the Court and the defence side has not assailed this proposition placed by the prosecution. There are documents also on record to show that Gadadharanandji was the chairman. It has come in evidence that on 03.05.1998, the deceased was in the temple and in the morning, he had visited village Khanjali along with Nautam Swami, Ghanshyam Swami and Nilam Swami in a motor car – TATA Sumo. The vehicle was being driven by Ramesh Bhagat. This Ramesh Bhagat is referred to as his driver by PW Laxmiprasad. More than one witness including Jatin Bhagat has said about the visit of Gadadharanandji to village Khanjali on 03.05.1998 and he had returned at about 12.30 p.m. Prior to his arrival from village Khanjali,

PW 8 Ismail Adam Vora had reached to the residence/room of Gadadharanandji. This Ismail Vora was told by PW Jatin Bhagat that he should wait and Guru will return now at any time from village Khanjali. This PW 8 Ismail has not supported the case of prosecution to material extent. Even than, it has come on record that this witness had seen PW Chiman and PW Jatin Bhagat. This witness was told by Gadadharanandji that he should come at about 4.00 and they would go to purchase a mirror for bath-room. It was a Sunday and Gadadharanandji in turn was informed that market and shops would be closed and when he asked permission to leave, Guru Gadadharanandji told him to stay over because of some torchy heat wave. Thereafter, he instructed Jatin Bhagat that he should fetch a pair of chappal from the place of Ismail (PW 8). At that time, PW Chiman and PW Gandalal were sitting on ota. The presence of PW Jatin and PW Kinjal Joshi is found natural along with the presence of PW Chiman Parmar and PW Nazirmiya. So, none of these witnesses, according to us, can be said to be chance witness. PW Chiman has narrated

his duties and work that he had performed on 03.05.1998. This part of conduct of this witness is also found natural. He had been inside the room of Guru Gadadharanandji to extend courtesy by messaging the feet of Guru Gadadharanandji. Considering the number of persons who had entered the room of Guru Gadadharanandji for the purpose of messaging the feet of Guru after his return from village Khanjali, creates an impression that the message either must have been offered and could have been done for some seconds or say for few minutes. It is a courtesy and/or devotion showing gesture expressed for the Guru. The case of the prosecution is that under some enticement, the deceased had left his room in the company of accused No.3 Madhavprasad. The presence of accused No.3 Madhavprasad at the spot and near the residence of Gadadharanandji has been proved by PW Chiman and PW Nazirmiya. PW Nazirmiya has been declared hostile by the prosecution, but he has stated in the cross-examination by ld. Spl.PP that he had seen deceased Gadadharanandji and accused No.3 Madhavprasad when they were sitting in a blue

colour car and he had also seen that car going out. Both these witnesses have been cross-examined at length by the defence side. PW Nazirmiya, as discussed earlier, was drum player and it was his duty to open and close gates of the temple and he had performed that duty. One gate was opened by him at about 2.00 p.m. It may be at 1.50 p.m. or may be at 2.05 p.m. So, at about 2.00 p.m.,the gate was opened. It is satisfactorily established by the prosecution that PW Nazirmiya was in the area where the room of Guru is located and he was somewhere near the place where PW Chiman was sitting on ota. It is nobody's case that Nautam Swami who had accompanied Gadadharanandji during his visit to Khanjali, was found in or nearby area and/or Guru had accompanied Nautam Swami on that day in the vehicle of Nautam Swami. It is in the evidence of PW Ismail that PW Jatin Bhagat and PW Kinjal Joshi were to go to Nadiad in the evening and ultimately both of them had gone to Nadiad on that evening. But prior to it, at the instance of Guruji, after half an hour of the arrival of Guru Gadadharanandji from village

Khanjali, PW Jatin had left the room/residence of Guru with PW Ismail for fetching a pair of chappal and he bolted the room from outside. It is in the evidence of PW Jatin Bhagat that PW Chiman and PW Gandalal were sitting on the ota opposite to the residence/room of Guru. This PW Gandalal is having a weak I.Q. and is cleaning utensils of the temple. PW Chiman was asked by PW Jatin Bhagat that if desired, Guru himself shall come out otherwise do not permit anybody else to enter the room as Guru is resting.Thereafter, he had gone with PW Ismail. PW Ismail was having two pairs of chappal and he had received them from Pakistan. It is in evidence of PW Jatin Bhagat as well as of PW Ismail that PW Jatin has stayed at the house of Ismail for about 20 to 30 minutes. PW Jatin Bhagat returned any time between 2.00 to 2.30 p.m., but he found room/residence of his Guru locked. He stayed out side for about five minutes. Thereafter, he opened the room and went inside. He found stick and turban of his Guru lying there inside the room. Thereafter, he rested on floor in the room. PW Kinjal

thereafter come and asked about where-about of Guru and in response thereto, he (Jatin Bhagat) told that he does not know as he had gone out and had been to town. At about 3.00 to 3.15 p.m., PW Jatin Bhagat inquired from PW Chiman as he was there in the room used for crushing and making wet powder from sandle-wood. He inquired from PW Chiman and also asked as to who had opened the bolt (whole draft). Thereafter, PW Chiman stated that he had opened the whole draft/bolt and he had gone inside for messaging the feet of Guru. He also told that he does not know as to where Guru had gone. Thereafter, Jatin Bhagat and Kinjal Joshi had inquired from temple, but nobody was knowing as to where the Guru had gone. Thereafter, PW Jatin and PW Kinjal Joshi went to Nadiad with accused No.2 Shrijicharan in maruti zen car. Car was being driven by accused No.2 Shrijicharan and accused No.4 Ghanshyam Prakashdasji was also there in that car. The fact of leaving Vadtal temple with a view to pay visit at one ceremony which can not be said to be very important or significant so far as Jatin Bhagat and Kinjal Joshi were

concerned, is proved. So, it is clear from the evidence that none of these two including the nearest disciple PW Jatin Bhagat had suspected anything wrong qua absence of Guru in his room and so, he made casual inquiries by asking Chiman and other persons " where Guru had gone?" (Guru Kya Gaya Chhe?) The conduct of PW Jatin Bhagat, PW Chiman or PW Kinjal till PW Jatin and PW Kinjal left for Nadiad or their return from Nadiad after attending the function at the place of Durgesh Bhatt, is not found a conduct which can be said to an anxious conduct qua the absence of Guru Gadadharanandji, otherwise according to us, both or at least PW Jatin Bhagat would not have left for Nadiad. They had probably not anticipated such a serious and heinous turn in the events otherwise PW Jatin Bhagat would not have accepted the advise given by Acharya Maharaj when he had gone to him to seek advise and guidance as his Guru and Chairman of the Temple Board namely Gadadharanandji was missing and had not returned. It is clear from the evidence that some anxiety had started when PW Kinjal and PW

Jatin Bhagat found that Guru Gadadharanandji was not seen when they left Vadtal temple for Nadiad and had also not returned till the time of sun set. It is in evidence of PW Jatin Bhagat that even when they were proceedings towards Nadiad, he had inquired from accused No.2 Shrijicharan about Guru Gadadharanandji and when he would return. At that time, accused No.2 had replied that he does not know. Accused No.4 Ghanshyam Prakashdasji was in the very car. Accused No.2 was driving car and it was a maruti zen. After return from Nadiad, PW Chimanbhai who is working for security of the gate and he had replied that he does not know. At about 11.00 p.m., this witness had inquired from one Kapilbhai of Surat. In the early morning at about 5.30 a.m., Kapilbhai had come to Vadtal. On 04.05.1998, PW Jatin had gone to the office of Kothari and after seeking appointment, he went to the residence of Acharya Maharaj. Acharya Maharaj is residing in Vadtal town and his residence is out of actual temple premises. Acharya Maharaj was appraised about missing of Guru and he was advised that he should wait for a day so if Guru

had gone somewhere nearby, then he would return. He had also asked Acharya Maharaj to file a police complaint, but he was advised to wait for a day. When he had gone to Acharya Maharaj, Kinjal Joshi, Kapilbhai who had come from Surat and accused No.2 Shrijicharan were also there. This part of evidence does not loose its strength only on the ground that neither Jatin Bhagat nor Kinjal Joshi practically were interrogated thoroughly as also PW Chimanbhai and/or PW Nazirmiya who were present, as stated earlier, in the temple premises. They had no reason to doubt accused Nos. 1, 2 or accused No.4 as all the three were with Jatin Bhagat and Kinjal Joshi when they had left Vadtal for Nadiad and then also in joining during their visit at the residence of Acharya Maharaj on 04.05.1998. It is rightly argued by ld. Counsel Mr. Ravani that this conduct of accused persons should be considered as relevant when a planned murder is alleged by the prosecution and the accused are facing charge of conspiracy. It appears that each accused were asked to perform a specific duty or were asked to act in a

particular manner. It is clear from the set of evidence led that the accused were in need of some breathing period of about 24 to 36 hours or say maximum 48 hours. PW Nazirmiya- drum player, according to us, has deposed specifically that he had seen accused No.3 Madhavprasad and deceased Gadadharanandji in the company of each other. Presence of Madhavprasad-accused No.3 near the residence of Gadadharanandji is also proved by PW Chiman. It is true that PW Chiman was also arrested and interrogated by CBI, but the time selected by the accused is such that no other responsible person concerned and connected with Vadtal Temple would be there. Considering the time of closure of temple gate known as Hanumanwala Darwaja, mostly used by devotees, flow of worshipers and devotees would be there after 3.00 p.m. or round about that time. Chaklashi Police was not investigating the crime of kidnapping or abduction. Main goal of Chaklashi Police was to trace out the Guru and nobody would thought of his murder, otherwise the disciples of Gadadharanandji would not have waited up to 5.05.1998. Chaklashi police was

also inquiring about the entry made in the Register maintained by it, but as Gadadharanandji was the Chairman of a very popular and wealthy religious charitable trust of State of Gujarat, non-return of Guru for some more hours compelled the law and order maintaining machinery to switch over the investigation from one hand to other. So, from the deposition of the officer of the concerned police station i.e. Chaklashi Police Station, Nadiad Town Police Station or the Crime Branch, it is clear that there is no indeapth inquiry or detailed interrogation of the witnesses. As the car in which Guru was taken as per the case of the prosecution was having tainted glass, so the person who anxiously try to see from wind screen the person sitting inside the car or accidentally such person would be able to see or locate the person sitting in the car, only then the such person viz. persons who were having their shops outside the temple gate, would be able to respond the queries that might have been raised by the inquiry making officer. As the temple gate remains closed up to 2.00 p.m.,

there would be doubt qua the availability of the traders or persons having their shops out side the temple gate or the hawkers doing business by selecting a particular point in the area outside the main gate of the compound. It is true that the answers given by PW Nazirmiya are in response to the suggestive questions, but this evidence is of a positive nature. While asking the question under section 313 of CrPC put to the accused persons, ld. Trial Judge has not asked any question as to this incriminating part of evidence.

(xvi) It is true that the answers recorded by the trial Court are the answers in response to the leading suggestive questions and should be given weightage less than the facts stated by the witness i n examination-in-chief where such questions are not permitted to be asked. Any incriminating fact which if comes on record during the course of cross-examination of any defence counsel, the Court would not be under an obligation to ask the question in that regard to the accused to explain that part of evidence

because that fact can be said to have been a fact brought on record by the accused or at the instance of the accused, but when such incriminating evidence comes on record during the course of cross-examination by the Public Prosecutor after obtaining permission to treat such witness as hostile witness or the facts recorded in response to the question asked with permission of the Court to confront that particular witness on the facts stated by him before the police in his police statement or panchanama drawn without treating that witness or panch as hostile, than it would remain incriminating evidence and such evidence should not be treated as the evidence of an inferior quality. Here, PW Nazirmiya gets some corroboration from PW Chiman Parmar whereby PW Chiman Parmar has stated that he had seen accused No.3 present near the steps of Sabha Mandap. This very witness has stated that when he came out of the room where he is working after restarting the machine used for preparing wet sandle-wood powder, he had not seen that blue colour car. It also appears that deceased

Gadadharanandji was also in a mood to go out on first available opportunity otherwise there was no reason for him to push away his one of the disciple out of the room with PW Ismail Vora to bring a pair of chappal. On one hand, Guru was anxious about the temperature of the torchy heat when he was talking with this very PW Ismail Vora, he asked his disciple to accompany this PW Ismail Vora so as to fetch a pair of chappal. It is in evidence that normally the Guru was putting on a canvass shoes and so regular visitor PW Ismail Vora could have been asked to bring a pair of chappals on his next visit to temple. This PW Ismail Vora was also asked by Guru Gadadharanandji that they would be going out in the evening and so he may inquire about the purchase of one mirror for bath-room. In that circumstance, evidence of that witness PW Ismail is suggestive of the effect of some enticement made earlier to Guru Gadadharanandji. When this very Guru had left for village Khanjali in the morning with perifernials and followers etc., he would not leave the temple alone with accused No.3 at odd hours and that

too hours for his rest. It is in evidence that one Gandabhai who has very weak IQ as stated earlier, and so it was not possible to trace out convincing evidence from this Gandabhai and PW Chimanbhai was not all the while present near the residence/room of Gadadharanandji as he had gone inside the room popularly known as “Chandanvali Ordi”.So, the facts stated by PW Nazirmiya that he had seen deceased Gadadharanandji with accused No.3 sitting in blue colour car on 03.05.1998 in the after-noon and had also seen that blue colour car going out, is the evidence which could have been accepted as a reliable piece of evidence. This witness has stated that PW Chiman was already there with him on ota. In his examination-in-chief, he has stated that he does not know what had happened thereafter and has expressed his ignorance about the presence of blue colour car belonging to accused Madhavprasad-accused No.3. It is in the evidence of more than one witnesses that an open area near Shabha Mandap was being used as a parking area and cars were being permitted to enter into through entry gate

addressed as main entry gate of temple. However, this gate is other than the gate known as Hanumanwala Darwaja. It emerges from the evidence that only permitted cars were allowed inside the temple. So, PW Nazirmiya and PW Chiman Parmar have deposed about the cars as per their personal impression, but both these witnesses were sure about the presence of blue colour car. It is true that no specific date and time has been stated by PW Nazirmiya as argued by Mr. Thakkar when he has stated that he had seen deceased sitting in blue colour car, but when witness is answering a question of an incident of a particular date, than such details are not required to be stated and the Court also should not expect such minute deposition from a witness having a law profile background. In the cross-examination, PW Nazirmiya had admitted that the facts stated by him in response to the question asked by ld. Spl.PP that he had seen the deceased in the company of accused No.3 Madhavprasad and going out in a blue colour car, were not stated by him in his statement before CID Crimes. He has also stated that he had seen

only one white car going out side the temple and deceased was not sitting in that car. This part of evidence gives a clear picture that though white maruti car had left the temple on that very day, Guru Gadadharanandji had not gone in that car. This fact does not nullify the effect of the evidence given by him that he had seen a blue colour car going out. The answer given by him in the cross-examination of the defence counsel that no other car had gone out while he was on the gate, would not help the accused because according to this witness, he had seen blue colour car going out with accused No.3 and the deceased when he was sitting on the ota and it had already left the gate when he had returned to ota. Thereafter, he was sitting in the company of PW Chiman on ota for some time and Gandabhai was also there. The facts stated by this witness that one un-known person was driving the car is in reference to the white maruti car that he had seen going out of the temple. It has come on record that normally Sadhu or Brahmchari, as per the religious testaments of Swaminarayan Sect would not go out

alone. Minimum one person, either a Sadhu or Parshad or even a Brahmchari would be there in the company. This would mean that always, there would be two persons. That second person may be Hari Bhagat- a disciple or devotee also. Under no situation, Guru could not have left alone and that too after crossing the main gate or gate known as Hanumanwala Darwaja and minimum one person must have accompanied him. In the same way, white car seen by PW Nazirmiya was also having therein two persons or more than that. It is clear from the evidence led by the prosecution that Guru had left the place in the company of one and that one person was accused No.3 Madhavprasad. So, there was no reason for the trial Court to disbelieve PW Nazirmiya on this point and this part of evidence was not required to be ignored totally treating this version as improved version of the witness. The story told by PW Nazirmiya is nothing but a CBI creation, is one of the arguments of ld. Sr.Counsel Mr. Thakkar, but it is not found acceptable otherwise this very witness could have stated so in his examination-in-chief and

he would not have any reason to fumble in response to the questions asked. The answers given by this witness, on close reading of the evidence, give an impression that he must be under a tremendous pressure, but ultimately the truth has been told by him, at least on the point that Gadadharanandji has left temple in whose company and in which manner he had left. Chaklashi Police who was inquiring into the matter as well as this very witness would not have even visualized the gravity of the events that had he had seen and noticed. It is in evidence that one car had left that very Vadtal temple for Nadiad and accused Nos. 1,2 & 4 were in that car along with PW Kinjal Joshi and PW Jatin Bhagat. So, if the answer given by PW Nazirmiya is true that he had not seen any other car going out from the gate on that day, would become an incorrect statement. So, this witness does not know about each and every detail, but he had stood to the test on the facts stated by him that he had seen deceased in the company of accused No.3 Madhavprasad sitting in the blue colour car and that car going out. It is not a

matter of dispute that colour of the car regularly driven by Madhavprasad-accused No.3 was having a blue colour. Non-disclosure of the very facts before the CID, Crimes does not go to the root of the strength of the evidence of this witness because PW 54 Navghan Jadav (exh.259) has stated that between 12.05.1998 and 17.05.1998, he was in charge of investigation qua Entry No.27/1998 made in the register of Chaklashi Police Station. On 14.05.1998, investigation was handed over to CID, Crimes and that he has not recorded statements of any witnesses. So, PW Navghan Jadav had never gone to PW Nazirmiya for recording his statement in detail. In the same way, PW 53 Nagji Khengarbhai Desai who was PSI, Nadiad Town Police Station from 03.04.1997 to 21.05.1998, has taken over the investigation qua Entry No.27/98 on 08.05.1998. Entry is of 05.05.1998. He has stated in his examination-in-chief (exh.258) that he had recorded statement of witnesses, but no pointed question has been asked during the course of deposition that he had inquired asking a pointed question to

Nazirmiya about the number of cars that had entered the temple premises on that day i.e. 03.05.1998 and whether he had seen deceased in the company of any other Sadhu or Brahmchari in the temple premises in the after-noon. PW 52 Arvind Ranchhodbhai Patel, PSI, Chaklashi Police Station (exh.256) who has recorded the statements of witnesses, has not stated specifically in his deposition that he had recorded statement of PW Nazirmiya. The defence side also had not asked any question to this witness that the statement of PW Nazirmiya has been recorded by this witness PW 52 Mr. Patel or not. The contradictions are also proved qua PW Jatin Bhagat, PW Ismail Vora and PW Chiman Parmar. The only suggestion made to this witness is that panchanama exh.169 was written in the police station, but he has denied this suggestion. So, it emerges that no detailed questions were asked qua this PW Nazirmiya. This Court would not like to condemn this witness as unreliable witness observing that he had made one material improvement only with a view to involve accused No.3 in particular and accused

persons in general. On the contrary,he must be under an obligation of accused Nos. 1 & 2 having very good influence in the office of Kothari and management of the temple affairs. This witness is a poor employee and a drum player. It is the experience of the Court that some people are telling lie deliberately and some are even asked not to tell truth. Such truth appears on their tongue and on the touchstone, such truth is found reliable. It is also the experience of the Court that some reliable witnesses trying to express truth, but having incapacity to put their say in a very appropriate or exact manner than expected, their evidence is not being used as helpful evidence to the Court in a fact-finding exercise. So, as such, there is no strength in the arguments of ld. Sr.Counsel Mr. Thakkar that this witness (PW Nazirmiya) does not know anything about the presence of a blue colour car or leaving deceased Guru Gadadharanandji in the company of accused No.3 and he has told these facts for the first time before the Court under pressure of CBI and that trial Court ought to have dis-

believed his version. There is some logical force in the arguments advanced by ld. Counsel Mr. Ravani for CBI that inquiries made by PW Jatin Bhagat and PW Kinjal Joshi before they left for Nadiad were of casual nature and they were anxious to know that where the Guru had gone and that they were not kin to know immediately that where is the Guru and if he has gone some where, than in whose company he had gone, because Guru Gadadharanandji was not supposed to leave the temple premises alone. The temple premises including residential complex covers huge area. Some area is known as Brahmchari Niwas. Some area is known as Lakkadpitha area. Some part is used as Bhojanalaya and some for searching storage of ration etc. So, the disciples may not have asked where the Guru had gone meaning thereby in which area or which part of the temple. It is true that there were some limitations in the movements of Guru Gadadharanandji, but it is also clear that he was able to move even out of temple with the help of stick and was able to manage the affairs and administration of temple.

His election as Chairman in the recent past from the date of incident, is indicative of his capacity to take care of day to day management of the entire administration including huge temple complex at Vadtal. So, the initial inquires made by PW Kinjal Joshi and PW Jatin Bhagat from the persons present in the area and answers given by such persons in response to the questions, is not required to be given too much weightage as emphasized by Mr. Thakkar. For short, reading of evidence of PW Nazirmiya along with evidence of PW Chiman Parmar, there is a substance in the story of the prosecution and no error in recording the finding can be said to have been committed that the deceased was last seen in the company of accused No.3 in Vadtal temple when he left along with him in a blue colour car. The real test is whether he has stood to the tough test of cross-examination.

(xvii) PW Chiman has been condemned by ld. Sr. Counsel Mr. Thakkar as puppet of CBI as he was once interrogated thoroughly by police officer and was also asked to undergo Lie Detection

Test. The police was supposed to inquire into the matter thoroughly and it is the experience of the investigating agency as well as of the Court that in number of cases, the persons who are approaching police either as complainant or witnesses are found involved in the crime or found suspects, are ultimately found to be key witnesses to the incident. So, the investigating agency if has started taking all the persons surrounding the victim i.e. deceased Gadadharanandji or having close contacts, as suspects, then that act of the investigating agency itself would not make all those individuals unfit or to become prosecution witness. When such a person is examined in the court, he should not be branded as unreliable unless he is found unreliable on the touchstone of the reliability and trustworthiness. When the presence of witness Chiman at the spot was natural and he gets corroboration regarding the presence of accused No.3 Madhavprasad in his car from PW Nazirmiya, then there is no reason for this Court also to say that the evidence of PW Nazirmiya should be read in reference to the

context and in the background of the version of PW Nazirmiya. So, the arguments referred to herein above criticizing the say of PW Chiman Parmar, advanced by ld. Sr. Counsel Mr.Thakkar, are not found acceptable.

(xviii) It is also not possible to accept that the testimony of PW Nazirmiya should not be accepted as reliable because the prosecution itself had prayed that he should be declared hostile. It is true that treating a particular witness hostile to the party who has called him to depose in the Court, the Court can permit the prosecution to cross-examine its own such a witness,but in number of cases, the Courts have appreciated the evidence of hostile witnesses and study of such cases takes this Court to certain situation under which witnesses can also be categorized. Viz;

(i)totally hostile witness, and

(ii)witness whose hostility is partial.

It is also possible to divide first category i.e. totally hostile witness into different

parts; viz

(a) witness who turns hostile to the prosecution and remains hostile throughout irrespective of the fact whether he is being cross-examined by the defence side or not.

(b) witness who is totally hostile to the prosecution, but during the cross-examination, supports the defence version or depose in the manner which may not only destroy the case of the prosecution, bu facts stated by him during the course of cross-examination, may help the accused in probablizing the defence.

(c) the witness who supports the case of the prosecution in full in examination-in-chief, but turns hostile totally during the course of cross-examination and, therefore, the court permits the prosecution to cross-examine the very witness granting him permission to treat the

witness hostile.

The second category of the witnesses who are partially hostile to the prosecution can also be divided in sub-categories; viz

(i)one who does not support the case of the prosecution initially, but after treating that witness hostile, partially or fully supports the prosecution during the course of cross-examination by Public Prosecutor and during the cross-examination, no serious impeachable aspects are emerging;

(ii)The second category would be that the witness may support the case of the prosecution, but may turn hostile partially with a view to help the accused or for any other reason;

(iii)The witness who is not declared hostile formally by the order under section 174 of CrPC, but supports the case of the prosecution partially.

So, while appreciating the evidence, the Court should firstly categorize the hostile witnesses because in number of cases, because of some inherent infirmity or limitation including the capacity to understand, qua the questions that are being asked to such witnesses, the Court may find that he is hostile to the party who has called him for examination and would accord permission to treat that witness as hostile. Therefore, the misconception regarding the effect on the testimony of a witness declared hostile crops up. Here, PW Nazirmiya falls in category (ii)(a) and PW Chiman would fall in category (ii)(c). The Court is taken through various decisions in reference to the terms “hostile”, “adverse” or “unfavourable” witness. We have already reproduced in earlier part of this judgment the relevant para-11 of the decision in the case of ***Gura Singh v/s State of Rajasthan 2001 Cri.LJ 487 (supra).***

In the case of Rama Reddy **Rajeshkhanna Reddy and Anr. V/s State of A.P., 2006(2) GLH 271 (supra),** the Apex Court in para-28 has observed

thus:-

> " The last-seen theory, furthermore, comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. Even in such a case courts should look for some corroboration."

The above observations are based on the observations made by the Apex Court in the case of **State of UP v/s Satish, JT 2005(2) SC 153= (2005)3 SCC 114.** In the case of Satish (supra), it is observed that the last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. The present case is not the case wherein it was not possible for the prosecution to establish that when the deceased

was last seen he was in whose company. There is nothing on record to show whereby it is even possible to presume that after the movement when deceased was seen leaving Vadtal Temple premises in blue colour car, was seen alive either alone or in the company of somebody other than accused No.3 Madhavprasad. Phraseology "so small" used in the above-cited decision of the Apex Court would have relative effect in some cases. Number of hours can be said to be a "small period" and in a given circumstance, even an hour or two may be found a period which can not be termed as a "small period". The time of departure of deceased Gadadharanandji in the afternoon at about 2.30 p.m. and time of the dead body located by PW Shankar Damor in the outskirt of village Barothi, considering the distance between these two places, can be said to be "so small" so that the Court can imagine the possibility of entry of any third person and it would be difficult for the Court to say positively that there is no reliable and sufficient evidence that the deceased was not last seen in the company of accused No.3

Madhavprasad, as period in between does not look like a long gap. Possibility of other person coming in between is not found existing. It is true that some other positive evidence to conclude that the accused and deceased were last seen together in the company of each other should be there otherwise it would be hazardous to come to a positive conclusion as to the guilt of the accused. It is not necessary to reproduce the ratio emerging from number of decisions cited on the point, but the law is that when the Court is satisfied that last-seen theory is applicable and it would come into play, than the Court is competent to draw an inference against the accused in whose company the deceased was last seen alive. Onus would be then shifted on the accused and the accused has to satisfy the Court as to why such an adverse inference should not be drawn against him. Of course, he can do this by leading evidence or by showing other acceptable probabilities. In the present case, no such exercise has either been done by accused No.3 oor by any other accused because all of them are facing the charge of a

criminal conspiracy.

(xix) One witness viz. PW 35 Premvatinand (exh.205) has stated in his cross-examination (para-8) that on 03.05.1998, Shrijicharan, Ghanshyam Bhagat, Kinjal Joshi and Jatin Bhagat had gone to Nadiad. He had seen them going. Thereafter, he had seen Kinjal Joshi and Jatin Bhagat in the temple at about 6.00-630 p.m. Thereafter, after about one hour, he had seen Shrijicharan and Ghanshyamji i.e. accused Nos. 2 & 4 as they had also returned. Accused No.3 Madhavprasad and Vijay Bhagat were there in the temple when Shrijicharan and Ghanshyam Bhagat, Kinjal Joshi and Jatin Bhagat had gone to Nadiad at the place of one Mr. Durgesh Bhatt and on 03.05.1998, all i.e. all the accused were in the temple. This witness has been treated hostile by the prosecution. It appears from the contradictions brought on record and proved by the prosecution that his hostility is total. Not only that he had tried to help the defence side during his cross-examination by ld. Counsel appearing for accused Nos. 2,4 & 5. There was no

cross-examination of this witness on behalf of accused No.3. Obviously, the facts that could have been brought on record through this witness, had come on record in reply given by this witness to the questions asked on behalf of accused Nos.2,4 & 5. He is a resident of Vadtal Temple. He was inspecting the material received and purchased by the Temple Board Trust. Bills were also coming to him from the office. So, considering the scope of affiliation between this witness and accused Nos. 1 & 2, his evidence is found unreliable. No part of evidence of PW Premvatinand is found acceptable. So, it would not be possible for us to accept the arguments of ld. Sr.Counsel Mr. Thakkar that the evidence led by the prosecution on the point of last-seen would go weak in light of the evidence of PW Premvatinand.

(xx) As discussed earlier, it is not possible for us to accept the arguments of ld. Sr.Counsel Mr. Thakkar that as Bichchhuwada police has committed a mistake in not registering the offence punishable under section 302 of IPC even

after the receipt of post-mortem report and certificate as to cause of death of the person found dead within the jurisdiction, the police station officers were undue pressurized and entire set of evidence in the nature of panchanama and recovery of muddamal is nothing but a creation. Considering the number of persons involved in the entire exercise that had taken place on 04.05.1998 including PW Shankar Damor, Dr. Rajkumar Gupta, Videographer Vasantkumar and the panchas who have signed certain documents, the trial Judge has rightly observed that this part of evidence collected by CBI is genuine. On evaluation of this part of evidence, it is convincingly proved that the dead body was found initially by PW Shankar Damor and other villagers and in turn the procedure followed by Bichchhuwada police is genuine exercise that was carried out. An error of not registering the FIR and keeping entry made in the register of Bichchhuwada Police Station under inquiry contemplated under section 174 of CrPC, is nothing but a mere irregularity on the part of SHO of Bichchhuwada Police

Station and it would not make the exercise done by CBI doubtful. Why Dr. Gupta would become a party in such an exercise because the accused have attempted to show that the recovery of key bearing mark “tri circle, China” was planted and ingenuine recovery shown to establish the link between the deceased and missing Guru Gadadharanandji with the help of Bichchhuwada police. Videography made on 04.05.1998 has not been disputed as mentioned earlier. It is not even the say of the accused that in that videography, the muddamal key is not seen. The place where dead body was found in the area where the post-mortem was carried out, is practically the same area-location. The prosecution has tried to prove the said fact through panchanama drawn under section 27 of the Evidence Act at the instance of accused No.3 Madhavprasad. So, the person who was last seen in the company of the deceased is the very person who took the CBI officials for the first time at the place and on inquiry, CBI officials found that before some months, Bichchhuwada police had recovered a dead body from that

place. This panchanama is at exh.188. As observed by the Apex Court in the case of ***Rama Reddy Rajeshkhanna Reddy (supra),*** the panchanama exh.188 under section 27 of the Evidence Act is other positive evidence which can be used as a corroborative piece of evidence in holding that the last seen theory would come into play in the present case. The genuineness of this panchanama is seriously assailed on various grounds' viz

(i)That the CBI personnels ought to have brought the panchas from Mumbai as the accused No.3 Madhavprasad allegedly shown his willingness to disclose the incriminating facts against him which could be received in evidence under the scheme of Section 25;

(ii)The second ground is qua the unfairness on the part of the investigating agency by placing the panchas inimical to the accused;

(iii)That the CBI officials were knowing and must be knowing about the place

before the accused had allegedly taken the panchas and CBI officials at the spot and the IO Mr. Krishikar was aware about the location. So, there is no meaning in accepting the panchanama exh.188 as genuine panchanama under section 27 of the Evidence Act. The presence of Bichchhuwada Police even at odd hours found is suggestive of one clear fact that Bichchhuwada police was asked to remain present when Mr. Krishikar along with the team of panchas and accused No.3 had to reach there at the spot.The subsequent panchanama drawn i.e. panchanama exh.191 is nothing but a drama of drawing panchanama by the Investigating Officer to add the strength to the earlier panchanama exh.188 and panchanama exh.191 is inadmissible in evidence and the same can not be termed as panchanama drawn under section 27 of the Evidence Act.

(iv)Investigating Officer Mr. Krishikar

has incorporated inadmissible evidence in the panchanama exh.188 and this illegality makes the panchanama infirm and inadmissible in evidence in toto. So, no use of this document exh.188 could be made.

The evidence led by the prosecution and panchanama exh.188 reveals that prior to panchanama exh.188, accused No.3 Madhavprasad when was under interrogation and in custody of the IO at Mumbai, he must have shown some inclination to disclose certain aspects and, therefore only, IO Mr. Krishikar brought the accused along with other subordinate officers to Nadiad. It emerges from exh.188 that IO was informed during the interrogation that the deceased was throttled in the room within the temple premises and in the area known as “Habbad Pitha Vando”. This Court is also informed that that area is also known as “Lakkad Pitha Vando”. It is a residential complex used by Sadhus. So, obviously if panchas are selected from Bombay, then it would have given scope to the other side to argue

that though pancahanama was to be prepared at Vadtal, CBI personnels have brought panchas of their selection and choice all the way from Bombay and that too from at a distance of about more than 400 kms. It is clear from the set of evidence that some exercise was done at Lakkad Pitha Vando area. The date and time of search and seizure panchanama of the residential premises of accused nos. 1 to 3 are found relevant. The residence of accused No.1 was searched on 28.03.1999 between 9.30 A.M. and 4.00 P.M. by IO Mr. Krishikar, residence of accused No.2 was searched on 28.03.1999 between 8.10 A.M. and 7.15 P.M. by PI CBI, Gandhinagar. The residence of accused No.3 was searched on 28.03.1999 between 9.30 A.M. and 12.15 P.M. by Mr. Raman Pandya, Sub Inspector, CBI, Navi Mumbai, at Chhattralaya- Office Premises. The second search list prepared at the residence of accused No.3 was prepared on 28.03.1999 between 2.30 P.M. and 4.30 P.M. at Lakkad Pitha Vando. During these searches, CBI has recovered one car-tape which according to the case placed by the prosecution, is significant and in this

background, in an interrogation, the investigating agency may have got further clue because till section 27 panchanama was drawn in the month of April-1999 of the location where the blue colour car in a burnt and damaged condition was lying i.e. Gurudatta Guarage, the said car tape was not found. Two keys and lock have also been recovered by CBI on 08.04.1999 under a panchanama exh.104. So, the exercise carried out by CBI on 2nd & 3rd April at Barothi appears to be not a fishy exercise. It is true that Bichchhuwada police was supposed to inform all the police stations in the nearby area about the finding out of a dead body, but it is difficult to believe that Bichchhuwada police had informed all the neighbouring police stations of State of Gujarat also. They may have waited for a querry from Gujarat police. Merely because State of Rajasthan is under CBI, Mumbai and CBI, Mumbai has territorial jurisdiction over the State of Rajasthan also, it would be extreme to imagine that the police of State of Rajasthan also must have informed about the dead body found from the outskirt of village Barothi

in the month of May-1998 itself. Bichchhuwada police could have submitted “A” Summary to the nearest Magistrate, but the papers were lying with Bichchhuwada police along with the muddamal seized keeping inquiry under section 174 of CrPC pending. On close scrutiny of the evidence led by PW Shankar Damor, PSI Bhati, Panch Gautam and IO Mr. Krishikar, it is not possible to accept that when IO Mr. Krishikar along with his team of his officers and panchas had reached at the spot, during the dark hours and after some hours of sun-set, the Bichchhuwada police was present to receive them and to assist them. The question asked to IO Mr. Krishikar as to his visit to village Barothi and Bichchhuwada gives a clear impression that the visit of CBI Team along with IO Mr. Krishikar was the first visit when CBI Team was taken at the spot on 02.04.1999. In the cross-examination of PW Shankar Damor, it has come on record that CBI people had reached during night hours and at that time, the residents of village Barothi gathered there and no inquiry was made by CBI personnels from the villagers. On the contrary, some conflict

/quarrel had taken place between CBI officials and the village people and because of that, Bichchhuwada police had been there. This witness has given narration of the place where dead body was lying in his examination-in-chief and the same gets corroboration from the panchanama drawn by Bichchhuwada police on 04.05.1998. It has come on record that CBI personnels had sought intervention of Bichchhuwada police on 02.04.1999 and it also appears that somebody from village had also informed the Bichchhuwada police. So, undisputedly, Bichchhuwada police was not present when CBI team had reached at the spot at the instance of accused No.3 Madhavprasad. There is nothing on record to show that anybody of the team of CBI including panchas were aware about the spot situated at the outskirt of village Barothi. The crucial question raised before us is whether the disclosure of the fact as to spot by the accused in presence of panchas firstly orally and than by the conduct i.e. by way of stopping the car in which each of them were traveling at the spot, can be said to be a discovery of a

fact by an accused in custody which is admissible in evidence as per the scheme of section 27 of the Evidence Act.

(xxi) Number of decisions have been placed before us by the ld. Counsel appearing for the parties. However, we would like to discuss some of the decisions for the purpose of the present judgment.

(A) In the case of **Pulukuri Kottaya and others v/s Emperor, AIR (34) 1947 Privy Council 57,** the Apex Court has observed that the condition necessary to bring section 27 into operation is that the **discovery of the fact must be deposed to,** and thereupon so much of the information as related distinctly to the fact thereby discovered **may be proved.** (Emphasis supplied). The ratio of this decision is reflected in para-10 of the decision which reads as under:-

> "10. Sec.27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into

operation is that discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police Officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in police custody produced from some place of concealment some object, such as a dead body, a weapon, or ornaments, said tobe connected with the crime of which the informant is accused. Mr. Megew, for the crown,has argued that in such a case, the “fact discovered” is the physical object produced, and that any information which relates distinctly to that object can be proved. Upon this view information given by a

person that the body produced is that of a person murdered by him, that the weapon produced is the one used by him in the commission of a murder, or that the ornaments produced were stolen in a decoity would all be admissible. If this be the effect of section 27, little substance would remain in the ban imposed by the two preceding sections on confession made to the police, or by persons in police custody. That ban was presumably inspired by the fear of the Legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. On normal principles of construction their Lordships think that the proviso to S.26, added by S.27, should not be held nullify the substance of the section. In their Lordship's view, it is fallacious to treat the “fact discovered “ within the section as equivalent to the object

> produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that “I will produce a knife concealed in the roof of my house” does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, th fact discovered is very relevant. But if to the statement the words be added“ with which I stabbed A”, these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.”

This decision has been considered as a milestone and the same has been referred and followed in number of decisions of this Court and other Courts including the Apex Court.

(B) In the case of **Prem Prakash Mundra v/s State of Rajasthan & Another, 1998 SCC (Cri.) 896,** a dead body of the deceased was allegedly recovered in pursuance of the statement made by the appellant accused, but on facts, the Apex Court found that the appellant merely knew the place where the dead body was buried and there was no statement of the accused which can be said to be reliable that he had buried it. It was explained by the appellant accused that he had come to know about that place from co-prisoners who were there with him in the lock-up. The Apex Court held that these circumstances would not be useful to the prosecution.

(C) In the decision of the Apex Court in the case of **Bakshish Singh v/s State of Punjab, 1971 (3) SCC 182 (= AIR 1971 SC 2016)**, the case of the prosecution was depending on six material contingencies and one of the contingency was of discovery of some of the body parts of the deceased as well as scythe on the information given by the accused appellant when he was in

police custody. The Apex Court, ultimately found that only incriminating evidence against the accused appellant was of “pointing out the place where the dead body of the deceased had been thrown.” The Apex Court has held that “this, in our opinion, is not a conclusive circumstance though undoubtedly, but raising strong suspicion against the appellant.” The prosecution had established that there were broken teeth and parts of human body lying there at the very spot. Hence, any one who had seen those parts, could have inferred that the dead body must have been thrown into a river nearby that place. In absence of any other circumstance, the Apex Court observed that the circumstances put forward must be satisfactorily proved and those circumstances should be consistent only with the hypothesis of the guilt of the accused.

(D) In the case of **Earabhadrappa alias Krishnappa v/s State of Karnataka, (1983)2 SCC 330,** the Apex Court has observed thus:-

7. There is no controversy that the statement made by the appellant Ex.P.35 is admissible under Section 27 of the evidence Act. Under Section 27 only so much of the information as distinctly relates to the facts really thereby discovered is admissible. The work “fact” means some concrete or material fact to which the information directly relates. As explained by Sir John Beaumont in Pulukuri Kotayya v. Kind Emperor (AIR 1947 PC 67);

> “..... it is fallacious to treat the “fact discovered” within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact.”

8. For the applicability of Section 27 therefore two conditions are prerequisite,

namely (1) the information must be such as has caused discovery of the fact; and (2) the information must "relate distinctly" to the fact discovered. In the present case, there was a suggestion during the trial that PW 26 had prior knowledge from suggesting during the trial that PW 26 had prior knowledge from other sources that the incriminating articles were concealed at certain other places and that the statement Ex.P.35 was prepared after the recoveries had been made and therefore there was no "fact discovered" within the meaning of Section 27 of the Evidence Act. We need not dilate on the question because there was no suggestion made to PW 26 during his cross-examination that he had known the places where the incriminating articles were kept. That being so, the statement made by the appellant Ex.P.35 is clearly admissible in evidence."

The ratio and the observations of the cited decision would help the prosecution in the present case and not to the defence on

evidence.

(E) In the case of **Bodh Raj v/s State of J & K, AIR 2002 SC 3164 (= (2002)8 SCC 45),** the Apex Court was dealing with the scope and limitation regarding the information that distinctly relates to fact discovered which is admissible in evidence under section 27 of the Evidence Act. According to us, para-18 of the judgment is relevant, but we would like to reproduce the relevant part of para-18 which reads as under:-

> "18. .....It would appear that under S. 27 as it stands in order to render the evidence leading to discovery of any fact admissible, the information must come from any accused in custody of the police. The requirement of police custody is productive of extremely anomalous results and may lead to the exclusion of much valuable evidence in cases where a person, who is subsequently taken into custody and becomes an accused, after committing a crime meets a police officer or voluntarily goes to him or to the

police station and states the circumstances of the crime which lead to the discovery of the dead body, weapon or any other material fact, in consequence of the information thus received from him. This information which is otherwise admissible becomes inadmissible under S. 27 if the information did not come from a person in the custody of a police officer or did come from a person not in the custody of a police officer. The statement which is admissible under S. 27 is the one which is the information leading to discovery. Thus, what is admissible being the information, the same has to be proved and not the opinion formed on it by the police officer. In other words, the exact information given by the accused while in custody which led to recovery of the articles has to be proved. It is, therefore, necessary for the benefit of both the accused and prosecution that information given should be recorded and proved and if not so recorded, the exact information must be adduced through evidence. **The basic idea**

embedded in S. 27 of the Evidence Act is the Doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered as a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature but if it results in discovery of a fact, it becomes a reliable information. It is now well settled that recovery of an object is not discovery of fact envisaged in the section. Decision of Privy Council in Pulukuri *Kotayya v. Emperor (AIR 1947 PC 67),* is the most quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect. *(See State of Maharashtra v. Danu Gopinath*

Shinde and others (2000) Cri LJ 2301). **No doubt, the information permitted to be admitted in evidence is confined to that portion of the information which "distinctly relates to the fact thereby discovered." But the information to get admissibility need not be so truncated as to make it insensible or incomprehensible. The extent of information admitted should be consistent with understandability."**

The finding rules out the argument of total inadmissibility of discovery panchanama.

(F) In the case of **State of Haryana v/s Jagbir Singh and Another, (2003)11 SCC 261,** the Apex Court was dealing with the case based on circumstantial evidence. It is observed that "there is no doubt that conviction can be based solely on circumstantial evidence, but it should be tested on the touchstone of law relating to circumstantial evidence laid down by this Court as far back as in the year 1952." Quoting relevant para of the decision of the case of ***Hanumant Govind Nargundkar and another v/s State***

of Madhya Pradesh, AIR 1952 SC 343, the Apex Court reproduced para-21 of the decision in the case of ***State of Rajasthan v/s Raja Ram, 2003 AIR SCW 4097 (=AIR 2003 SC 3601).***In para-21, it has been observed as under:-

> 21. Coming to the bloodstains on the cloth which were allegedly seized on being pointed out by the accused, the forensic laboratory report indicated that there were blots of human blood on the shirts and trousers of the accused. There was no effort to find out the blood group. In fact the High Court noted this position and observed that presence of PW-4 at the time of recovery is doubtful as he has been found to be an unreliable witness. It was observed that even if it is accepted that there was existence of blood, this circumstance is not such from which it can be found that the accused was perpetrator of the crime. In the aforesaid report (Ex. 61) it was clearly stated that the blood group of blood found on the clothes could not be determined. Neither the blood group of the deceased nor

that of the accused was determined. In that background, the High Court held that the possibility of the blood being that of the accused cannot be ruled out. In view of the findings recorded by the High Court about the non-acceptability by evidence relating to alleged extra-judicial confession, the conclusions of the High Court cannot be said to be one which are unsupportable.

It is important to note that case where the accused at relevant point of time is found not in the custody of police while disclosing or discovering the fact or if it is found that police already knew the body or muddamal articles where they were hidden, takes that case out of the purview of section 27 of the Evidence Act.

(G) In the case of **Krishna Mohar Singh Dugal v/s State of Goa, AIR 1999 SC 3842 (= 1999 AIR SCW 3917),** the Apex Court found that the only evidence against the appellant accused is the discovery stated to have been made by him of 07

grams of Charas. The Apex Court found that the evidence clearly disclosed that the police was already informed about the place where Charas was concealed before the appellant had taken the police to that place and, therefore, no reliance could have been placed upon the recovery of Charas.

(H) In the case of **Makhan Singh v/s State of Punjab, AIR 1988 SC 1705,** the Apex Court was dealing with the circumstance against the accused appellant. We would like to reproduce the relevant para-14 for convenience:-

> "14. Then we are left with the recovery of the dead bodies. Investigating Officer S.I. Puran Singh (PW-8) admitted in cross-examination that after recording the statement of Amrik Singh he could not know the correct place where the bodies and other articles were kept buried and concealed. This clearly indicates that he could get some information from the statement of Amrik Singh. As seen earlier, the field is an open place surrounded by other fields and

according to Nihal Singh the adjacent field is his own as he had taken it on lease and therefore it cannot be said that any one else could not have known about the bodies being buried in the field. The Investigating Officer himself admitted that after recording the statement of Amrik Singh he knew that the bodies were buried in the field but he felt that information was not sufficient. It cannot therefore, be said that the place from where the bodies recovered was such a place about which knowledge could only be attributed to the appellant and none else. Since the exclusive knowledge to the appellant cannot be attributed, the evidence under Section 27 also cannot be said to be a circumstance against the appellant."

In the cited decision, the Apex Court has not accepted the fact of discovery of fact as admissible in evidence under section 27 of the Evidence Act in the background of the evidence (facts proved) that was available on record.

(I) In the case of **Jaffer Hussain Dastagir v/s State of Maharashtra, AIR 1970 SC 1934,** the Apex Court was dealing with the confession of the accused as well as disclosure of certain facts while in police custody. In this cited decision, the accused had told the police the names and whereabouts of the persons to whom he had handed over the stolen articles. The Apex Court found that the police was already knowing the person who had those articles and, therefore, on facts, it has been held that the statement made by the accused was not admissible under section 27 of the Evidence Act.

(xxii) In our view, the decisions cited by the ld. Sr.Counsel Mr. Thakkar are based on one another argument that there are circumstances to show that IO Mr. Krishikar was aware about the place and was also knowing that Bichchhuwada police had recovered a dead body in the year 1998 or at least any time prior to the panchanama under section 27 of the Evidence Act in April-1999. But, as discussed earlier,

contrary facts have come on record and it is clear from the evidence of IO Mr. Krishikar as well as PW Shankar Damor along with other witnesses examined including Panch PW Gautam that the Bichchhuwada Police was not told in advance at the spot, but it had to rush to the spot because of some quarrel that had taken place between villager and CBI personnel on 02.04.1999 during dark hours. It is clearly stated by the IO Mr. Krishikar that because of the darkness, it was not possible to draw a detailed panchanama of the place where the dead body of deceased Gadadharanandji was thrown. Irrespective of the second part of the panchanama drawn on 03.04.1999, it is possible to hold that Bichchhuwada police was not present when accused No.3 took the panchas as well as CBI team at the spot. This conduct of accused No.3 is relevant in view of the provisions of section 8 of the Evidence Act, as argued by ld. Counsel Mr. Ravani for CBI. The possibility that IO Mr. Krishikar may be knowing about the spot is found too remote. In absence of any incriminating fact situation, it would not be

proper for the Court to infer against the investigating agency that it is playing a game of hide and seek on this point.

In the case of **Vijender v/s State of Delhi, (1997)6 SCC 171,** the Apex Court was dealing with typical facts. We would like to state facts of this decision in brief which are reflected in paras 2(a) & 2(b) of the said decision:-

> "2(a) Shorn of details, the prosecution case is as under:-
>
> (a) On 26.06.1992 at or about 11 a.m. Raj Kumar (PW 4), a resident of Johripur, went to the house of Shaikh Raful Hassan (PW.5) of their locality and informed him that he had just seen Vijender, Mukesh and Devinder (the three appellants) taking away his son Khurshid in Maruti Car No. DDB5067. On getting that information, P 5 called upon the police control room over telephone and reported the kidnapping of his son. Lady Constable Urmila, who was then on duty in the Police Control Room, received that

message and communicated it to Gokalpuri Police Station as village Johripur fell under its jurisdiction. On receipt of that communication SI Shivraj Singh (PW 8) recorded the same in the daily diary book under Entry No.13-A (Ext.PW 8/A) and proceeded to Johripur. There he met PW 5 and assured him that his son would be traced out soon. Since in spite of such assurance, his son remained untraced till evening, PW 5 went to the Police Vigilance Cell and lodged a report there (Ext.PW 15/A). On the following morning PW 5 went to Gokalpuri Police Station and lodged another report which was recorded by PW 8 (Ext.PW 5/A). Treating this report as the FIR PW 8 registered a case and Shri RS Chauhan (PW 19), the Station House Officer of Gokalpuri Police Station, took up its investigation.

(b) In the meantime some officers of Loni Police Station in the district of Ghaziabad (U.P.), while on patrol duty in the afternoon of 27.06.1992 found the dead

body of a young boy aged about 17/18 years lying by the side of railway lines in village Banthala. Sub-Inspector Santosh Kumar (PW 20) got photographs of the dead body taken (Ext.PW 20/B) and, after holding inquest thereupon, sent it to the Ghaziabad mortuary for post-mortem examination:"

In the background of the above facts, while evaluating evidence, in para-17 of the said decision, the Apex Court has observed thus:-

> "17. Another elementary statutory breach which we notice in recording the evidence of the above witnesses is that of Section 27 of the Evidence Act. Evidence was led through the above three police witnesses that in consequence of information received from the three appellants on 30.06.1992 they discovered the place where the dead body of Khurshid was thrown. As already noticed, the dead body of Khurshid was recovered on 27.06.1992 and therefore the question of discovery

> of the place where it was thrown thereafter could not arise. Under Section 27 of the Evidence Act if an information given by the accused leads to the discovery of a fact which is the direct outcome of such information then only it would be evidence but when the fact has already been discovered as in the instant case- evidence could not be led in respect thereof."

In this cited decision, the dead body was recovered by Loni Police Station officials in district Gaziabad, U.P., when they were on petrolling duty in the afternoon of 27.06.1992, but the FIR was registered by the SHO Gokalpuri Police Station which is within the State of Delhi. On the evidence, the Apex Court has observed that there is elementary statutory breach. However, in light of the facts of the case on hand, the observations made by the Apex Court in the above-cited decision would not help the defence side. It is possible to hold that under section 27 of the Evidence Act, the

information given by accused No.3 had led to the discovery of the fact which was the direct out-come of such information and, therefore, admissible in evidence under section 27 of the Evidence Act. So, the above-cited decision of Vijendra (supra) would not help the accused. On the other hand, the decision in the case of **State of Himachal Pradesh v/s Jeet Singh, JT 1999(2) SC 99,** would help the prosecution. Para-25 of the said decision gives a slight turn to law as to discovery of fact and recovery of articles at the instance of the accused. Undisputedly, the interrogation of the accused is the one of the important source and the investigating agency can get important clues from the accused during investigation. If very important fact is divulged by accused during interrogation and if investigating agency is able to recover some important evidence or fact relevant to other facts collected by way of evidence, than it can be made use of by the prosecution and the Court can consider such evidence so collected. Relevant paras of the said decision read as under:-

“26. There is nothing in Section 27 of the Evidence Act which renders the statement of the accused inadmissible if recovery of the articles was made from any place which is "open or accessible to others". It is a fallacious notion that when recovery of any incriminating article was made from a place which is open or accessible to others it would vitiate the evidence under Section 27 of the Evidence Act. Any object can be concealed in places which are open or accessible to others. For example, if the article is buried on the main roadside or if it is concealed beneath dry leaves lying on public places or kept hidden in a public office, the article would remain out of the visibility of others in normal circumstances. Until such article is disinterred its hidden state would remain unhampered. The person who hid it alone knows where it is until he discloses that fact to any other person. Hence the crucial question is not whether the place was accessible to others or not but whether it was ordinarily visible to others. If it is not, then it is immaterial that the concealed place is accessible to others.

"27. It is now well settled that the discovery of fact referred to in Section 27 of the Evidence Act is not the object recovered but the fact embraces the place from which the object is recovered and the knowledge of the accused as to it. ***(Pulukuri Kottaya v. Emperor, AIR 1947 PC 67).*** The said ratio has received unreserved approval of this Court in successive decisions. ***(Jaffar Hussain Dastagir v. State of Maharashtra, (1969) 2 SCC 872) : (AIR 1970 SC 1934), K. Chinnaswamy Reddy v. State of Andhra Pradesh, AIR 1962 SC 1788, Earabhadrappa alias Krishnappa v. State of Karnataka, (1983) 2 SCC 330 : (AIR 1983 SC 446), Shamshul Kanwar v. State of U.P., (1995) 4 SCC 430 : (1995 AIR SCW 2741), State of Rajasthan v. Bhup Singh, (1997) 10 SCC 675.***

29. In the present case, the fact discovered by the police with the help of (1) the disclosure statements, and (2) the recovery of incriminating articles on the strength of such statements is that it was the accused who concealed those articles at the hidden places. It is immaterial that such statement of the

accused is inculpatory because Section 27 of the Evidence Act renders even such inculpatory statements given to a police officer admissible in evidence by employing the words: "whether it amounts to confession or not".

“33. No doubt it is a sound principle to remember that every criminal act was done with a motive but its corollary is not that no criminal offence would have been committed if prosecution has failed to prove the precise motive of the accused to commit it. When the prosecution succeeded in showing the possibility of some ire for the accused towards the victim the inability to further put on record the manner in which such ire would have swelled up in the mind of the offender to such a degree as to impel him to commit the offence cannot be construed as a fatal weakness of the prosecution. It is almost an impossibility for the prosecution to unravel the full dimension of the mental disposition of an offender towards the person whom he offended.”

As discussed earlier, the accused had attempted to mislead the investigating agency while disclosing certain facts during

investigation and the place of commission of offence was indicated as a premises situated within Vadtal temple complex known as Lakkadpitha Vanda, but during the course of investigation, it has been found at subsequent stage that the deceased was murdered at Sant Niwas, Navli Gurukul Complex and within the premises of Navli Gurukul Complex. Thereafter, on the disclosure of fact which was within the exclusive knowledge of the accused persons and mainly accused No.3, led CBI Team at the spot in the outskirt of village Barothi, which was otherwise impossible to arrange for such visit so that the Team can reach before the sun-set or day light is there. Considering the time mentioned in the panchanama drawn by CBI on 02.4.1999 when team proceeded towards the State of Rajasthan with panchas and the geographical distance, it was not possible for them to reach before sun-set. If it was a planned journey as alleged by ld. Sr.Counsel Mr. Thakkar, than the entire team could have started much earlier by calling the witnesses on the national high-way. So, it is not possible for this Court to accept

the proposition placed by Mr. Thakkar that section 27 panchanama should not be accepted as legal and admissible evidence against the accused No.3 or any of the accused because the police was aware about the place and there is no element of discovery.

(xxiii) It is true that the dead body was lying in the open place and some of the articles have been recovered by CBI Officials after long lapse of time i.e. on 03.04.1999 when police of Rajasthan had already recovered the body from the place where CBI Team was allegedly taken, would not make the panchanama of discovery of fact made by accused No.3 illegal. The fact within the knowledge of police or some other individual till then remain a fact in the exclusive knowledge of the accused in reference to the police in whose custody the accused is. In our country, there are number of limitations as to the communication and unless the person abducted or killed is important person/ VIP and unless such fact is not made known on account of intervention of such other fact, the existence of grave fact would not become a matter of a

knowledge or information to the people residing even in the nearby area or vicinity. As observed earlier, Bichchhuwada police was not knowing about the fact of missing Guru Gadadharanandji, otherwise, it would have contacted Gujarat Police and in particular Kheda District Police. There could not have any reason for Bichchhuwada police to remain inactive or silent if the fact of missing Guru Gadadharanandji was within their knowledge. In the same way, firstly the Kheda District Police and thereafter CBI were not aware about the fact of a dead body found by Bichchhuwada police of State of Rajasthan, otherwise, they could have approached the State of Rajasthan. The “exclusivity of knowledge” discussed by the Apex Court requires to be interpreted in the background of the factual contingencies of each case. Absence of knowledge has a direct relevance. That way, the Bichchhuwada police was not aware that the dead body recovered and cremated by it is of a person having an important status in Swaminarayan Sect and particularly qua Vadtal Gadi. In the same way, none of the followers of Swaminarayan Sect

under Vadtal Gadi or Kheda District Police or CBI people were knowing that they would not be in a position to recover the corpus of missing Guru if not alive.

(xxiv) It is impeached by the defence side that only with a view to carry out the panchanama as per the wish and desire of the investigating agency, the panchas were selected who were inimical to the accused. Reasonably strong arguments have been advanced in this regard that we have referred in earlier paragraphs, but it is in evidence that initially, there was a scope for the team to proceed towards Lakkadpitha Vanda and reaching of CBI officials with accused No.3 Madhavprasad to Vadtal would have made under section 27 panchanama more vulnerable and it could have been said that panchas were called simply to complete the formalities otherwise the investigating agency had already reached the spot and, therefore, the disclosure can not be said to have been made in presence of panchas.

This is not the case of recovery of articles at the instance of the accused so far as the panchanama drawn on 02.04.1999 is concerned and the best course normally being adopted by the investigating agency is to intimate the Sarpanch of the village so that he can depute persons to act and appear as panchas while drawing the panchanama. It is the say of IO Mr. Krishikar that the Sarpanch of Vadtal was asked to depute the panchas and they were sent from Vadtal. Of course, in the present case, the actual place of offence is found to be otherwise a premises located within the Vadtal Temple complex and Lakkadpitha Vanda and Sarpanch himself is also a witness and has acted as a panch. Whether both the panchas including PW Panch Gautam were informed about their visit to Rajasthan at the time when they were asked to join CBI team as a panch when they were at Vadtal or they were intimated for the first time by IO that they were to go for a long trip, again is a matter of debate, but this argument by itself would not make the presence of panchas or their independence doubtful because it appears from

the documents including the applications given to the District Collector, the anguish and anxiety that was prevailing in Vadtal town itself and the fact that number of leading citizens have started taking interest in the event and ultimate outcome of investigation. It is true that the relations were not cordial between some of the accused and panchas and there were criminal case filed and IO Mr. Krishikar ought to have inquired from the panchas in this regard, but considering the nature of criminal complaint filed and the respective years of those incidents which had occurred, what weightage should be given to this alleged animosity would be a question. In en-number of cases, this court and other courts have observed that merely because a person who is found to have been involved in a criminal case or is considered to be a head strong man, or is having some ill-feelings towards the accused or it is found that he may be interested in the result of the case having a status of a partisan witness, the evidence of such witness should be scanned closely and in absence of

strong corroboration which can be said to be of a cogent nature, version of witness of such categories should not be accepted as gospel truth. In absence of corroboration, the evidence of such witness would remain a weak piece of evidence. Considering the time gap between two major events i.e. (i) the date since Guru Gadadharanandji was missing, and (ii) accused No.3 when took CBI personnel at the spot where the dead body was burnt at the outskirts of village Barothi and that too during the dark hours, becomes very relevant and important when the team along with panchas must have gathered knowledge of the place where the accused No.3 has brought them, is the exact place from the information gathered from the villagers and thereafter probably from Bichchhuwada police that had reached there to intervene in the quarrel that had taken place between the residents of village Barothi and CBI Officials.We are convinced with the submissions of ld. Counsel Mr. Ravani for CBI and ld. APP Mr. Dave for the State that while undertaking such exercise, the police-CBI personnels working

with CBI are not putting on their uniforms and, therefore, the quarrel between the villagers and CBI team must have taken place and when the local people found that the persons trying to do some activities or movement during the dark hours are the CBI officials and they are there for a particular purpose, than co-operation has started and CBI people in presence of very panchas, were able to carry out the second part of the panchanama in the morning of 03.04.1999. In the second panchanama carried out on 03.04.1999, the investigating agency has collected some evidence. The time between first panchanama (exh.191) carried out on 02.04.1999 and the second panchanama (exh.192) carried out on 03.04.1999 was sufficient for CBI officials to interact with Bichchhuwada police. The questions, therefore, asked to IO Mr. Krishikar and other witnesses as to the interaction that has taken place between these two police agencies i.e. CBI and Bichchhuwada police and answers given, such interaction if has created a bridge of co-ordination, than it should not be viewed with doubt. It is not possible for this

Court to accept the say of the accused that during this period, CBI officials must have reprimanded Bichchhuwada police for not registering the offence punishable under section 302 of IPC and by bringing pressure on this count, the second part of the panchanma and other exercise were carried out by calling videographer. It is true that the second part of panchanama (exh.192) and the exercise undertaken by CBI of carrying out videography etc. is not that strong independent evidence and it appears to be a formality completed. But from this evidence, it is clear that certain articles lying including the parts of the body of the deceased in a sealed condition were received by CBI from Bichchhuwada police so that the same can be sent for further examination. It is important to note that samples were drawn for the very purpose, but in absence of other samples which can be compared with the articles seized by Bichchhuwada police after post-mortem, analysis even if carried out, would not have taken the Bichchhuwada police any further. The very articles seized by Bichchhuwada police were

found relevant to IO and, therefore, they were obtained and there is no serious dispute as to one fact that these articles were lying in a sealed condition and they were recovered as they were in that condition. Appropriate receipts have been passed by CBI to Bichchhuwada police and the evidence of SHO PW 62 Naransingh Bhati is found relevant. The evidence led by SHO Mr. Bhati in this regard is a substantive piece of evidence. So, the person who can not be said to be interested in the result or out-come of the investigation when is found supporting the version of IO Mr. Krishikar and panch Gautam qua the seizure of the body part and other articles including a key, would make the version of PW Gautam trustworthy irrespective of some ill-feeling prevailing before some years from the date on which he was selected and taken as a panch. It is true that the muddamal articles were handed over to CBI officials by Sub Inspector Lalsingh. At that time, i.e. on 04.04.1999, Mr. Lalsingh was in charge of Bichchhuwada police, but Mr. Bhati has identified his signature and has proved the

document exh.290 signed by Mr. Lalsingh and handed over to CBI. This part of evidence of Mr. Bhati has not been challenged during the cross-examination. The cross-examination made of this witness in reference to the maintenance of samples collected and entered into a register maintained by Bichchhuwada police, in our view, is not relevant because the muddamal articles were sealed at the very spot from where they were found and recovered and they were handed over in the similar condition to CBI in the year 1999 i.e. on 04.04.1999. But for accused No.3, all these eventualities would not have occurred, is the fact situation in the present case. While carrying out videography on 03.04.1999 at the time of drawing of panchanama exh.192, who had called videographer or whether videographer was introduced to CBI officials, would not a matter of much relevance because this part of evidence is subsequent to a crucial panchanama exh.191 drawn on 02.04.1999 which is more important and relevant. So, in our view, the absence of any diligence on the part of IO Mr. Krishikar while selecting panch

would not make the panchanama drawn under section 27 of the Evidence Act inadmissible in evidence or useless piece of evidence. So, this circumstance is a strong independent circumstance in favour of the prosecution which

can be said to have been satisfactorily proved beyond reasonable doubt.

(xxv) In the evidence of IO Mr. Krishikar, he has stated that a pair of keys bearing mark “tri circle, China” and a lock bearing mark “tri circle, China” have been recovered on 08.04.1999. So, it is clear that after collecting the evidence from Bichchhuwada police, the investigating agency has started collecting all possible corroborative piece of evidence and recovery of a key from Bichchhuwada police must have led the IO to recover the lock as muddamal article after locating the place where the corpus was lying and also to collect its body parts. It was necessary for the investigating agency to find out the actual place where the deceased was done to death. The

opinion as to the cause of death was available with CBI in the nature of PM Notes prepared by Dr. Gupta. So, according to us, the different panchanamas drawn under section 27 on discovery of facts by accused No.5 Vijay Bhagat has relevance. This panchanama is at exh.198 prepared on 18.04.1999. Navli Gurukul is a place which is not far away from Vadtal temple complex. The maximum distance found from the record available is of about 20 to 25 kms and minimum, as informed to this Court, is of about 10 to 12 kms. Without entering into the merits as to this geographical distance, it is clear that a person can reach in the motor vehicle at Navli Gurukul at the most within a period of 20 to 30 minutes. There is evidence on record to show that two of the accused persons were enjoying key position in the management of Navli Gurukul Trust. It is also clear from evidence that this Navli Gurukul also has a separate premises or ear-marked area known as Sant Niwas. Gurukul is nothing but a residential school. So, it can be inferred that each student resident may not have that easy access to Sant Niwas,

unless otherwise proved. It is the case of the prosecution that Vijay Bhagat-accused No.5 was the party along with the present accused persons when deceased was done to death. So, this accused No.5 Vijay Bhagat was a person competent to disclose and having exclusivity of the knowledge about each place. This panchanama is also assailed by placing reliance on the various authorities referred to herein above. Navli is a village. Panch Sunil Purohit PW 31 is examined vide exh.197 to prove section 27 panchanama. Other panch was Pravin M.Parmar. Both the panchas were called at Vadtal temple in Vadtal temple complex where CBI officers and accused Vijay Bhagat were present. When they reached there, CBI officials informed the panchas that accused Vijay Bhagat was to be taken to Navli and panchas have to accompany them. At that time, accused Vijay Bhagat told them that " we have to go to Navli and at the place where Gadadharanandji is murdered and he will show the place where Gadadharanandji is murdered." Thereafter, they started for village Navli. They had reached Navli and to Gurukul- Hostel

(Chhatralaya) at about 12.00 noon. Hostel portion of the premises was closed and, therefore, one Ghanshyam Bhagat (PW 42) was called. PW Ghanshyam Bhagat opened the gate of Sant Niwas and Vijay Bhagat took CBI officers and panchas in room No.3. When panchas were there in room No.3, PW Jatin Bhagat had come there and he was asked to call videographer. Practically when exercise of drawing pancahanama exh.198 was over, videographer had reached and thereafter, videography was made. IO Mr. Krishikar had instructed the videographer to videograph the things that may be shown to him (by Vijay Bhagat). IO had instructed the videographer to complete the videography and thereafter panchanama was concluded and signatures of the panchas were obtained. Ld. Trial Judge has rightly observed that most of the part of this panchanama exh.198 is inadmissible in evidence as the same is in the nature of confessional statement of the accused. Undisputedly, the videography is carried out at a later stage of the panchanama. Therefore, in our opinion, it is nothing but an unwarranted

formality undertaken by the investigating agency. The agency like CBI should not try to collect the evidence which has practically nil evidentiary value or evidence by itself is inadmissible. CBI has collected some wrappers of tablets as well as some pieces of burnt cotton from the backyard of Sant Niwas. PW Ghanshyam Bhagat has not supported the case of the prosecution. The prosecution has attempted to prove that metresses etc. on which the deceased was done to death, were destroyed prior to commission of the offence, the deceased was placed under the influence of tranquilizer tablets after diluting them in a glass of cold drink. We are not convinced that a burnt piece of cotton would remain there after a lapse of several months especially when Navli had witnessed monsoon in between 03.05.1998 and 18.04.1999. We are strained that how and why such incriminating article would lie there for this much of months, unless it is found through panchanama that there was no cleaning worth the name and the area from where these articles are collected, was lying practically as a garbage.

In our opinion, there is some over-doing by CBI. This is one of the part of evidence collected by CBI which is brought to the notice of this Court by ld. Sr.Counsel Mr. Thakkar when he was hammering on the point of legal requirements as to fairness in the investigation. The Apex Court and this Court has criticized the lethargy and over-doing by the investigating agency in number of cases, but it is the settled legal position which also should not be lost sight of that the lacuna left by investigating agency either deliberately or because of the negligence and over-doing on the part of the investigating agency, whether intentionally or under unwarranted and sheer enthusiasm, if is separable, than such lacuna or over-doing can be ignored and should be ignored and the court should concentrate on the legally admissible convincing evidence. If such evidence is found otherwise sufficient, than the accused can be linked with the crime. The investigating agency has collected the evidence to show that some tablets were purchased. If this part of evidence is accepted, than also, the tablets are nothing

but a tranquilizer. The Court should not place itself in the chair of an expert, but the prosecution when has not brought on record that the tablets were allegedly purchased by one of the accused so that the same can be administered to deceased Gadadharanandji in a cold-drink, was a tasteless tablet and effect of it would be within 30 to 40 minutes. Considering the age of the deceased, he could have been over-powered in Sant Niwas by two or more persons. Some pressure on the neck vis-a-vis of pillow would be sufficient to have a desired result. We will discuss the nature of evidence collected by the prosecution qua the purchase of tranquilizer tablets and cold drink tins from nearby shop by one of the accused i.e. accused No.2 Shrijicharan, herein after. Even if for the sake of arguments it is accepted that cold-drinks were purchased and brought to Navli and were used during the commission of the offence, then also it would have been used in a mood of celebration or to well-come the visitors. An impression is created in the mind of the Court that as there was some evidence as to purchase

of cold-drinks by accused No.2 and after that purchase in a couple of minutes/hour, he himself had left for Nadiad with PW Kinjal Joshi and PW Jatin Bhagat to attend janoi ceremony, the investigating agency probably was tempted to introduce the theory of administering tranquilizer to deceased Gadadharanandji. Number of tins purchased and the presence of the persons, as per prosecution case, who could be there at Sant Niwas, Navli Gurukul complex, is found relevant. So, the panchanma drawn under section 27 only proves that the deceased was done to the death in room No.3 at Sant Niwas, Navli Gurukul and this place was not known to anybody except the persons who were present at the time of commission of offence and in absence of convincing explanation as to the exclusivity of knowledge as to the place of murder, it can be inferred that Vijay Bhagat was one of the persons present. It is in evidence that till the time PW Kinjal, PW Jatin Bhagat and other two accused persons left for Nadiad, Vijay Bhagat was present there at Vadtal temple complex. There is no evidence as to how and when

accused No.5 Vijay Bhagat reached Navli. The crucial question which has cropped up before this Court is that in absence of convincing evidence as to the commission of offence as PW Ghanshyam Bhagat had turned hostile and collection of articles from the backyard of Sant Niwas is a weak piece of evidence, what would be the evidentiary value of the facts disclosed by Vijay Bhagat under section 27 panchanama. It is nothing but the discovery of the fact, but according to us, the prosecution was supposed to place before the Court in a logical and convincing way that deceased Gadadharanandji who had left in the company of accused No.3 Madhavprasad in a blue colour car was taken where and why. Section 27 panchanama only proves that the deceased must have been taken to Navli Gurukul Sant Niwas and Navli Gurukul undisputedly is the trust which is one of the subordinate public religious charitable trust under the basic management and control of Vadtal Temple Board. Of course, that by itself is an independent trust and to prove that sufficient oral as well as documentary evidence is

produced. So, the exclusivity of the knowledge about the Sant Niwas as place of murder is considered vis-a-vis the status of accused Nos. 1 & 2 qua the management of Navli Gurukul Trust, than the facts disclosed by accused Vijay Bhagat is not a piece of evidence which can be said to be ignorable fact. The prosecution has also collected the evidence to show that Gadadharanandji was asked to go/ come down to Navli under some enticement-inducement and to prove this aspect, some evidence is led. This part of evidence has also been seriously criticized by ld. Sr.Counsel Mr. Thakkar, but it is possible to conclude that till the time accused Vijay Bhagat indicated the spot i.e. Navli Gurukul, the prosecuting agency was not aware about the spot and the purpose for which Guru had readily agreed to go to Navli Gurukul and entered Sant Niwas. It has come in the cross-examination made on behalf of the accused side that deceased Guru had otherwise cordial relations with accused persons including accused No.3 Madhavprasad and accused No.2 Shrijicharan etc., in comparison with suspect Nautam Swami.

So, it was possible for the accused to take the deceased at a nearby place under any pretext or enticement. So, according to us, there is satisfactory evidence to show that the deceased was taken to Navli Sant Niwas or he had gone to Navli Sant Niwas after leaving temple complex on 03.05.1998 with accused No.3 Madhavprasad. Panch Sunil Purohit had volunteered himself as panch witness at the instance of PW.26 Sarpanch Ramanbhai Parmar. It is also true that as admitted by PW 30 Gautam Thakor, PW Sarpanch Ramanbhai Parmar was accused of the complaint filed by accused No.2 Shrijicharan, but when this PW 26 Sarpanch Ramanbhai Parmar was examined by the prosecution, no question in the cross-examination as to the animosity was posed. So, PW 26 Ramanbhai Parmar has no opportunity to explain the contingencies and it appears that the dispute was in relation to the management and affairs of Vadtal Temple etc. and PW Ramanbhai Parmar was the Sarpanch till the year 2000. So, merely because the name of the panch was suggested by PW Ramanbhai Parmar, would not make this witness as interested witness and,

therefore, doubtful. In the interest of honest or transparent administration of the temple complex and that too of a religious charitable public trust in a small town like Vadtal, it may be the anxiety of the followers and villagers of Vadtal and as PW Ramanbhai was Sarpanch, he might have expressed such anxiety in his own way and, therefore, controversy might have cropped up. So, unless pointed question in this regard is asked , the trustworthiness of the witness viz. Either Gautam Thakor or panch Sunil Purohit should not be viewed with any doubt. At the most, their say can be said to be the say of interested persons and the Court should try to get some corroboration. Panch Sunil Purohit is corroborated by IO Mr. who has drawn the panchanama.

As discussed earlier, it is not possible for this court to accept the say of the prosecution that any article incriminating against the accused was recovered at the instance of accused No.5 Vijay Bhagat. This part of evidence led by the prosecution look far away from all

reasonable probabilities. When the place of kidnapping or abduction is not in a near vicinity of the place where the person kidnapped or abducted is either raped or confined or murdered, than the act of pointing out that place either by oral disclosure or the facts recorded and proved as provided under section 27 of the Evidence Act or by leading the IO and panchas to that spot is a piece of evidence. In the case of Vijendra (Supra), if the facts of the said decision are seen which are referred to by the Apex Court in sub-paras (b) to (h), indicate that drawing of the panchanama under section 27 was nothing but a drama and on facts, it was possible to infer that the police was aware about the place of occurrence. Here in the present case, till the date on which the accused No.5 disclosed the facts as a place of murder, nobody was aware about that place. The dead body that has been found in the present case was at a distance of some 100 kms. away from the place of abduction and when a person of sound mind and comparatively healthy body could not have been taken safely and quietly alive at the place

where the dead body was found and when it was possible for the doctor who had performed the post-mortem to assess the time of death, the prosecution can well suggest and then prove the place of murder of the person so abducted and murdered. It is not necessary in all cases that something incriminating must be found out by the investigating agency from the place from where the person abducted was either raped, confined or murdered. So, the articles collected by the IO in presence of panchas and also proved by the panchas and IO Mr. may be a genuine exercise, but that has not yielded anything because this evidence, applying the principles of preponderance of probabilities, is found very weak piece of evidence and can not be said to a cogent evidence. The only part of this panchanama which can be said to be acceptable is that the abducted Gadadharanandji was taken from Vadtal temple to Sant Niwas, Navli Gurukul and that too in room No.3. The part of the panchanama containing other incriminating things including confession of offence is inadmissible in evidence, can not be made use of. In the same

way, the contradictions proved in reference to the oral evidence of PW Ghanshyam Bhagat also would not be useful as a substantive piece of evidence. However, it will not be possible for this Court to say that the investigating agency has not collected any evidence so as to find out the place where Gadadharanandji was done to death. The hostility of PW 42 Ghanshyam Bhagat is total and it makes this witness as self-condemned witness. But, this hostility by itself does not destroy the evidence led by the prosecution to show that the deceased was taken to Sant Niwas, Navli Gurukul under some enticement or inducement.

(xxv) In a criminal trial, the prosecution has to prove the offence by satisfactory evidence. The principle of “fact- factum-probendum” can be proved by certain inferences drawn from evidentiary facts, these evidentiary facts are viewed individually or in solitary way “per factum” may not look incriminating against the accused, but even than the prosecution can say that till all the pieces of circumstances

brought on record by leading satisfactory legal evidence, they should be considered cumulatively. The prosecution has relied on number of such circumstances. These circumstances brought on record by the prosecution whether are useful to prove the motive of the crime or to establish the link between the major circumstances or a group of circumstances inter-se or to link between the accused inter-se, are the questions posed before this Court. The conduct of an accused individually including unsatisfactory or false explanation given by the accused are found useful to the prosecution, is also one of such question posed. In such cases, considering the evidence placed by the prosecution vis-a-vis other facts including the status of the person abducted and ultimately murdered, it is possible to infer that the offending act was not possible for one or two persons- accused especially when the dead body is found at a very far distance. By pointing out the place of murder i.e. Sant Niwas, Navli Gurukul Complex, the prosecution has attempted to point out one aspect that Navli

Gurukul is the place where the accused Nos. 1 & 2 had commanding position. It is in evidence that accused No.2 Shrijicharan was a trustee of Swaminarayan Gurukul Trust, Navli bearing registration No. E/2838/ Kheda and accused No.1 was managing trustee and one Swami Bhakti Kishoredasji Purani was also one of the trustees. This Swami Bhakti Kishoredasji was Chief Kothari of Vadtal Temple. This change had taken place in the year 1997. Certified copies obtained from the office of the Charity Commissioner were before the Court vide list exh.24. Of course, these documents are not exhibited formally, but the oral evidence led by PW Chandraprakashdas (exh.139) has ramained practically unchallenged. Accused No.5 Vijay Bhagat is the disciple (Chela) of accused No.2 Shrijicharan. Accused No.3 and accused No.1 are related being disciples of their respective Guru who were Guru-Bhai. Even in the cross-examination of one of the witnesses i.e. PW Gautambhai (exh.187) it has come on record that in one complaint filed by accused No.2 against the witness concerned, accused Nos. 1 & 3 were

the witnesses. Accused No.4, at the relevant point of time, was Bhandari i.e. the person managing the stores etc. including kitchen stores. Nothing can be inferred only on the ground of thickness in relationship, but when the accused persons are posed as conspirators of the crime, their inter-se relations in the fact and structure, becomes significant and the inter-se thickness of relationship between the accused if is emerging from evidence, than it can be made use of subject to the availability of other evidence on conspiracy. It is also in evidence that the relations between the accused and especially accused Nos. 1,2 & 3 were not inimical and as observed earlier, it has come in evidence during the course of the cross-examination that the relations between deceased Gadadharanandji and accused persons were cordial, otherwise, considering the controversy and the inter-se tough of war relations, deceased Gadadharanandji would not have left the temple premises with accused No.3 Madhavprasad. It is not necessary for the prosecution to prove that where the conspiracy was hatched. It

is a settled legal position propounded in number of decisions that the conspiracy is being hatched in secrecy and it is not possible for the investigating agency to find out any direct or indirect evidence as to the hatching of a conspiracy. Obviously therefore, the place of hatching such conspiracy also would remain secret. May be by messages, meetigation of mind can take place anywhere and at any time. So, the Court should not expect such evidence. An inference as to conspiracy can legitimately be drawn on the circumstances and the evidence collected during the course of investigation. Undisputedly, deceased Gadadharanandji had already entered in a controversy by moving an agenda suggesting drastic changes by transferring and replacing Kotharis and Poojaris of temples under Vadtal Gadi. It has come on record that Acharya Maharaj- the Head of the Sect of Vadtal Gadi, was not willing for such drastic changes and especially the change in the position of Chief Kothari of Vadtal Temple (main temple complex). It is in evidence that Acharya Maharaj, at one point of time prior to

03.05.1998 was at Nasik and he had telephoned Gadadharanandji- Chairman of Temple Board Trust- expressing his dissenting view to the move taken by Gadadharanandji after taking over as Chairman of the Temple Board Trust to circulate agenda items as to the change in Kotharis and Poojaris of the temples under the said Board. It is deposed by PW Jatin Bhagat that he had over-heard the telephonic conversation between Acharya Maharaj and Gadadharanandji, of course, on the instructions of Gadadharanandji. However, what weightage should be given to this part of evidence is again an issue, but the fact remains that Acharya Maharaj thereafter had come down to Vadtal and he had sent a call to deceased Gadadharanandji asking Gadadharanandji to see him (Acharya Maharaj), but Gadadharanandji had turned down that request. The evidence shows that accused No.2 was the person who had been to Gadadharanandji to convey the message of Acharya Maharaj at odd hours. Of course, CBI has not chargesheeted Acharya Maharaj, but it is in evidence that on the controversial issue of transfer of Kotharis and

Poojaris, a call was sent and that call was conveyed by accused No.2 to Gadadharanandji. Nothing has come on record that the agency who had entrusted the investigation earlier qua the entry, had ever attempted to investigate in this direction. So, the role played by accused No.2 in carrying the words of Acharya Maharaj on the agenda item as to the transfer of Kotharis and Poojaris, is also a circumstance found relevant. One more circumstance pointed out by ld. Counsel Mr. Ravani is also found significant from two different angles because accused before this Court are denying their position and role in the office of Chief Kothari just to get out of the evidence led by the prosecution qua the motive of the crime. Those two angles are; (i) At the place of one Durgeshbhai Bhatt at Nadiad, in place of Kothari, two senior saints had represented the office of Kothari as Kothari and not by Swami Bhakti Kishoredasji who is actually a Chief Kothari of Vadtal Temple. No evidence is led in this regard whether it was not physically possible for said Swami Bhakti Kishoredasji to attend in the said function at

the residence of PW Durgeshbhai Bhatt or the person who had attended the function was acting as a de-facto Kothari vice the actual Kothari of the temple i.e. Swami Bhakti Kishoredasji, because PW Durgeshbhai Bhatt in his deposition at exh.210 has addressed accused No.2 Shrijicharan as Kothari of the temple. He is also named other side whom he had invited, but ultimately accused No.2 Shrijicharan along with one other saint (sadhu) had attended the function and two other disciples (Bhagats) were also there is the say of PW Durgeshbhai Bhatt. This witness has not been cross-examined. He has also identified accused No.2 as the person who had attended the function as Kothari and he has identified accused No.2 accordingly (i.e. as Kothari) These two disciples, according to him, PW Jatin Bhagat and PW Kinjal Joshi who were there in function along with accused No.2 Shrijicharan. So, taking of these two persons with them, is the circumstance according to ld. Counsel Mr. Ravani for CBI, which reveals a strategic move so that these two persons being close to Gadadharanandji -both disciples of

Gadadharanandji and one of them i.e.PW Kinjal Joshi co-incidentally being the distant relative, may not start acting anxiously for their Guru and so they were taken out of Vadtal Temple premises. This also suggests, in our view, cordial relations between accused No.2 Shrijicharan and Gadadharanandji. (ii) the second angle of circumstance is that the accused can keep curtain over their actual intention and act. Therefore only, it appears that no suspicion was raised against accused Nos. 1 & 2 initially and obviously therefore against other three accused persons. In our view, this argument of Mr. Ravani is found logical.

(xxvi) Failure in Lie Detection Test on the part of Nautam Swami and some other suspects would not create a circumstance favourable to accused and would not go against the case of the prosecution because this part of evidence is ultimately found to be out of context situation because the suspects were taken and innocent person feeling some inimical terms with a person missing or found dead might have been

frightened. The Lie Detection Test is nothing but a test which tests the mind and coolness of a person. A hardened criminal or a planned killer acting as per move planned earlier, may handle the situation efficiently and calmly and, therefore only the evidence of the Lie Detection Test carried out at the instance of investigation, is not being given great weightage. This type of evidence is considered to be a very weak piece of evidence and an infirm evidence. Successful clearance of a Lie Detection Test in a given circumstance, may go against them.

(xxvii) CBI has investigated the crime from various angles and that led CBI to various places including the office of the insurance company, to a motor guarage, and to the place where the car had allegedly met with an accident and in turn caught fire. It is in evidence that the car found burnt was having a blue colour. This car was taken to a guaragewala by accused No.3 Madhavprasad. As discussed earlier, the prosecution has proved beyond doubt that the

car had not caught fire because of illegal LPG gas connection otherwise the gas cylinder could have been found from the spot. Incident had occurred in an early hours as alleged by accused No.3 on 06.05.1998 and on that very day, the officer sent by the insurance company had reached there and surveyed the vehicle. An expert-eye of the Surveyor says that there was no impact of accident i .e. dashing of the vehicle with a tree. The motor car was having two devices so one can fix LPG Gas Cylinder, but FSL Report is suggestive of presence of inflammable substance on the parts of the motor car sent for analysis. The samples were sealed in the presence of panchas and there is no dispute as to their receipt by the expert in a sealed condition. We have carefully considered the parts taken out as samples by the investigating agency. The document exh.154 is the requisition sent by CBI with a questionnaire Annex.A and the test report i.e. expert's opinion on the subject says thus:-

RESULT OF ANALYSIS

Regarding query Nos. 1 to 3, 6,7, 9 & to 11

(Annex.A) :

The physical examination of the vehicle bearing No. GJ-6A-1894 at Anand (Gujarat) on 15.06.99 reveal that there are no effects of bursting/remnants of gas cylinder inside the vehicle. The vehicle was fitted with the arrangements to derive alternatively on LPG as well as on petrol.

Regarding Query No.4 :

The examination of vehicle bearing No. GJ-6A-1894 reveal that the dent in the lower portion of the front left side of the bumper have not been caused by hitting with a tree. Facilities do not exist to determine the speed of the vehicle to cause the dent in the front portion.

(xviii) Exh.147 is the result of five sealed parcels Nos. K-1 to K-4 & G-2 sent in a sealed condition for analysis which reveals that no common explosive/decomposition products thereof could be detected. However, it is inferred in the result of analysis (exh.149) that " the analysis by Gas Liquid Chroma to graph shows the

presence of inflammable substance in Exh. K-1, K-2, K-3, K-4 and G02." Earth material containing burnt debris was exh.K-1. Exh.K-2 contained broken pieces of glass etc. Exh.K-3 also contained burnt material along with broken pieces of glass and earth material. Exh.K-4 contained broken pieces of glass, small metallic piece and earth material and exh.G-2 was brunt jute gunny beg piece. These articles were collected in presence of panchas when car was physically lying in the guarage of P.W.13 Mohammad Shaikh. So, the suggestions made during the course of cross-examination to this PW 13 Mohammad Shaikh as well as to the panchas in whose presence the samples were collected that workers of the motor guarage were putting their articles, tools etc. in the said burnt vehicle and so it might be stained with such inflammable articles because the motor parts are being washed with the use of diesel and petrol etc., would not help the defence side. Normally, such things would be there on the floor part of the burnt vehicle, if kept, and such things would not be found on the piece of broken glass or

metallic piece of vehicle taken out since long period i.e. about more than 8 to 9 months. So, it is clear that the vehicle has not met with any accident. When this probability placed by the accused is considered in the background of the evidence collected by the prosecution, it is clear that the vehicle was set on fire. The date of alleged accident suggested by accused No.3 Madhavprasad i.e. early hours of 06.05.1998, is also a matter which becomes significant when it is found that vehicle was set on fire by using inflammable articles like petrol or diesel.

(xxix) The date of abduction is 03.05.1998, the finding out of dead body of the person deceased is 04.05.1998 by Bichchhuwada police, the formal complaint to local police is filed on 05.05.1998 and the police had started investigation /inquiry to find out the missing Guru. In early hours of 06.05.1998, the car was set on fire. When it is admitted by accused No.3 Madhavprasad that his vehicle had caught fire on 06.05.1998, the date of that incident remains undisputed. Anticipating the close examination

of the vehicle in coming future, this act is found to have been committed. This act of destroying evidence is the conduct of the accused and, therefore, is relevant.

(xxx) Exh.129 is an application submitted to the Branch Manager of the Oriental Insurance Company Ltd., Petlad. It is dated 06.05.1998 and the same is signed by accused No.3. The application bears vehicle number, policy number and the period of insurance. This application has been produced and proved by PW 7 Asstt. Administrative Officer of the Insurance Company and on the strength of this application, the vehicle was surveyed by PW 6 Arvindbhai Chaturbhai. PW 10 Chandra Praksh Swami was the person who had accompanied this PW Arvindbhai-Surveyor at the spot where the vehicle was lying on the highway. The insurance was obtained through an agent namely one Govindbhai Thakkar. This Govindbhai Thakkar has not been examined, but it is in evidence that PW Chandra Prakash Swami and PW Arvindbhai with Govindbhai were also there when survey was carried out and

photographs of the vehicle were taken. The photographs along with negatives are on record vide exh.127. The survey report exh.126 clearly states that as per the claimant, the date and time of the alleged accident was at 3.30 a.m. on 06.05.1998. The name of the driver is shown as Madavprasad Harjivandas **Kothari** (relevant for the present decision). The cause and nature of the accident described in column No.7 of the report says thus:-

> " As stated by Shri Madavprasad Harjivandas Kothari (Driver at the time of accident), the insured vehicle was coming from Rajkot to Vadtal. It was operated by gas cylinder. On the way, at the spot of accident, fire took place at the rear portion of the insured vehicle. Hence, he tried to see at the back and lost control. The insured vehicle gone out of road, dashed with a tree. He came out by opening R.S. Door and gone away. The vehicle was completely burnt."

It is also mentioned in the report that he had reached to the survey spot on the instructions from Divisional Manager of the Oriental Insurance Company, Nadiad. It is reported by the Surveyor that " as stated by Shri Madhavprasad Harjivandas Kothari, the insured vehicle was provided with gas cylinder and the vehicle was operated by gas. He was alone coming from Rajkot to Vadtal. On the way, near Galiyana, suddenly a fire took place at the rear portion of the insured vehicle..... The entire vehicle getting burnt with heavy blast and top channel also was thrown off." In the remark column, it is mentioned by the Surveyor that "when I reached the spot of accident, it was not reported to police. Hence, I had instructed them to lodge a police complaint". In response to the query raised by the court, this Court is informed that no formal police complaint was lodged regarding the alleged accident. In other words, it is not the say of the accused including accused No.3 Madhavprasad that accident was reported by him to the nearest police station or to the concerned

police station. The statement made by a person to a witness not in presence of police and the statement is found to be a voluntary statement, then merely because the maker of such statement is arraigned as an accused later-on, the evidentiary value of such statement would remain the same and it can be used against the accused being the maker of such statement. Driving licence of accused No.3 Madhavprasad was verified by the insurance surveyor PW Arvindbhai and number of it is mentioned in report exh.126 and date of issuance is mentioned as 26.07.1996. So, in the year 1998, he had enough experience to drive the motor vehicle and, therefore, unless it is otherwise specifically brought to the notice of the Court, it can legally be inferred that accused No.3 being a person authorized to drive a motor vehicle was aware that he is under a statutory obligation to report about the accident to police and preferably to the nearest police station. The act of not undertaking this exercise, is also a conduct and the Court can evaluate whether this omission of reporting the alleged accident to

police was a bona fide mistake or a deliberate act with a view to keep curtain on immediate investigation apprehending some adversity against him. It is pertinent to note that there was no reason for PW Arvindbhai to write any falsehood on 06.05.1998 or any time thereafter when he submitted the report to the insurance company. The report simply shows that it was possible to drive the vehicle by putting LPG gas cylinder. This part of the report and the statement made by accused No.3 Madhavprasad would show only the possibility that the vehicle can be provided liquid petroleum gas (LPG) as fuel for driving, but this possibility/contingency is not found sufficient especially when there is a clear opinion of the expert coupled with other aspects like the opinion of the Surveyor himself about the absence of impact of dashing of the vehicle with the tree and the formal complaint to the nearest police station and the concealment of the vehicle in a motor guarage till it was traced out by CBI during the course of investigation etc. which are not supporting the proposition

placed before the Court. On the contrary, it contradicts the stand taken by the accused before the Court vis-a-vis the insurance company. So, the arguments advanced by ld. Sr.Counsel Mr. Thakkar that only with a view to secure the claim, innocent falsehood was placed that the car met with an accident when vehicle was not legally registered and permitted to use LPG, otherwise the insurer was not to get any amount from insurance company. On one hand, the informant himself admits that a gas cylinder was being used, how an Advocate can contend before the Court that with a view to secure the claim amount, LPG cylinder might have been taken out by the user of the vehicle or by somebody else might have taken the same when the insurance company was specifically informed that the whole vehicle is found burnt because of the explosion of gas cylinder ? In that eventuality, the vehicle would not be in a condition in which it was found lying at the time of taking photographs at exh.127.

(xxxi) It is in evidence and this Court also

mentioned this aspect earlier that Sadhus and Brahmcharis of Swaminarayan Sect are supposed to move in a company of at least one another person either Sadhu, Sant, Parshad or even a Hari Bhagat (Devotee) of Swaminarayan Sect. Even then, accused No.3 informed the surveyor that he was on the way coming alone from Rajkot to Vadtal. How accused No.3 being a Sadhu, could be there alone in the car? The evidence of PW 11 Laxmiprasad who has been declared hostile and the evidence of PW Chandra Prakash Swami is contrary to the stand taken by accused No.3 Madhavprasad before the insurance company. The owner of the vehicle i.e. PW 11 Laxmiprasad has stated in his deposition that his maruti van was taken to Rajkot by driver Rakesh on 25.05.1998 and on second or third day, he was informed by Rakesh that car is burnt because of gas connection and he does not recollect whether Rakesh had informed him about the location or place where the car is lying. Thereafter, by handing over the insurance papers, he had instructed accused No.3 Madhavprasad to inquire into the matter. It is in evidence of PW Chandra

Prakash Swami that Madavprasad was staying with PW Laxmiprasad and they had one vehicle. It was being driven by Madavprasad and that vehicle had met with an accident That when he was in office, he was informed about the accident and he had accompanied Madhavprasad to take that vehicle from the place where it was lying and insurance agent Shri Govindbhai was with them and that vehicle was found lying near the tree between Bagodara and Tarapur and it was in a burnt condition and photographs were taken by the insurance surveyor. This witness Chandra Prakash Swami was residing in a Lakkadpitha Vanda which is located in Vadtal temple complex itself and accused No.3 Madhavprasad was his neighbour. There are 3 to 4 residents only in between. When the version of Swami Chandra Prakash is in conflict with the stand taken by accused No.3 as well as PW Laxmiprasad, it will not be possible for this Court to accept the proposition that a foolish mistake can only be said to have been committed by placing the false claim before the insurance company and this circumstance can not be said to be incriminating circumstance

against any of the accused including accused No.3. It is true that the contents of the report have not been proved specifically by PW Arvindbhai to the effect that Madhavprasad had told him that he was alone in the vehicle when the vehicle met with an accident, but the contents of the documents tendered in evidence and exhibited can be considered while appreciating the explanation given by the accused under section 313 of CrPC qua this contingency, otherwise it was possible for the accused No.3 Madhavprasad to say that somebody else was also accompanying him and the fact of accident is genuine and the question of setting the vehicle on fire by the accused would not arise. So, this circumstance is sticky strong circumstance against all the accused because all the accused are facing the charge of the offences punishable under section 201 R/w sec.120-B of the IPC. It is observed in more than one decision that an attempt to destroy the evidence by the accused allegedly in a substantive offence, is a subsequent conduct of the accused and it can be considered by the

Court while appreciating the allegations made by the prosecution to prove the substantive offence. Here, the case of the prosecution is that accused No.3 was last seen in the company of the deceased on 03.05.1998 and that very person is also impeached for destroying the vehicle in which he had left Vadtal temple complex with deceased Gadadharanandji on 03.05.1998, between these two days i.e. 03.05.1998 and 06.05.1998, the dead body of the person last seen in the company of accused No.3 was recovered by Bichchhuwada police on 04.05.1998.

(xxxii) The panchanama prepared by Bichchhuwada police of the place where dead body was found lying practically in a burnt condition, shows that wheel marks of a small vehicle were visible and map prepared by Bichchhuwada police clearly indicates that the marking were seen by the police and panchas in early hours of 04.05.1998. It is specifically mentioned that wheel marks were of a small vehicle and it is the case of the prosecution that the vehicle

used for taking the dead body of deceased Gadadharanandji was a maruti van (small vehicle). Of course, the exact size of the wheel marks is not mentioned in the panchanama,but it rules out the possibility of use of any other bigger vehicle or the vehicle having tyres of sufficient width. It is also mentioned in the panchanama that the vehicle after leaving highway, had entered the area where the dead body was found lying and the very vehicle had returned towards highway. So, the panchanama initially drawn by Bichchhuwada police of the place where dead body was found, contains this innocuous reference to the present crime because nobody was knowing that this reference would become a significant circumstance in reference to the car found in a burnt condition lying in a motor guarage in one of the towns of the State of Gujarat i.e. Anand, owned by one of the prosecution witness i.e. PW Mohammad Nazim Shaikh. So, it can be said that the prosecution has established that the dead body must have been carried in a small vehicle like maruti van at the spot and the nature of the vehicle was

found involved in the offence when has turned out as that of a small vehicle-maruti car- than it can safely be said that the dead body must have been carried in that very maruti van and with a view to destroy the evidence foreseeing close examination by FSL in the event of detection of crime may not come in the way of the person having ownership or having occupancy of the vehicle, the same was set on fire. To render such examination-analysis fruitless, it appears that a decision was taken to destroy the vehicle in toto. On seeing negatives as well as photographs taken by the Surveyor of the insurance company, the same are also able to give an impression that no driver can safely come out from R.S. Door without sustaining any injury.

(xxxiii) One more circumstance against the accused persons is that of separation of accused No.2 Shrijicharan and accused No.4 Ghanshyam Bhagat when they were to return from Nadiad to Vadtal after attending a function at the place of PW Durgesh Bhatt. One witness i.e. PW Jatin

Bhagat was told that because of a telephonic message, they i.e. accused No.2 Shrijicharan and accused No.4 Ghanshyam Bhagat shall have to go to Ahmedabad and, therefore, PW Jatin and PW Kinjal should go to Vadtal in an auto rickshaw. PW Kinjal was told that both of them will have to go to village Zundal and, therefore, they should return to Vadtal in an auto rickshaw. Considering the distance between the place where the function was organized at Nadiad and Vadtal temple, it is clear that accused Nos. 2 & 4 had separated from these two prosecution witnesses namely Jatin Bhagat and Kinjal Joshi while returning from Nadiad at any time between 5.00 to 5.30 p.m. PW Durgesh Bhatt also confirms that his request to stay over for some more time and to accept “prasad” (some food) was not accepted as they were in hurry. They had stayed there at the place of function for about 10 to 15 minutes. It is stated by this witness PW 36 Durgeshbhai Bhatt that they had come at about 5.00 to 5.30 p.m. on 03.05.1998. So, at the most, separation of accused Nos. 2 & 4 may be between 5.10 p.m. to 5.40 p.m. because it is in

evidence that PW Jatin Bhagat that they had returned to Vadtal temple at about 6.00 p.m. to 6.15 p.m. It is not necessary for the prosecution to give details minute-wise as if the account of minutes is to be brought on record, but when it is not disputed that Kinjal Joshi and Jatin Bhagat had left Vadtal temple in the company of accused Nos. 2 & 4 and only two persons namely Jatin Bhagat and Kinjal Joshi had initially returned to Vadtal, then why other two had not returned and both these witnesses were asked to return to Vadtal temple in an auto rickshaw, is the question. Of course, the investigating agency has not collected any evidence as to the use of phone by accused No.1. There is no clear evidence that whether accused No.1 was also having a mobile phone, but the evidence of PW Jatin Bhagat is found acceptable and reliable that both of them were made to understand that because of a telephone call received from accused No.1, accused Nos. 2 & 4 had separated. Now, the geographical distance between Nadiad and Navli and Vadtal temple and Navli, if considered, then it was possible for

the accused Nos. 2 & 4 to reach Navli at any time between 6.00 and 6.15 p.m. i.e. during the same period when PW Jatin Bhagat and PW Kinjal Joshi had reached Vadtal because other two were to travel in a maruti car. The time of death of the deceased assessed by Dr. Rajkumar Gupta tallies with the offending act of murder. It appears that the deceased was done to death at any time between 5.00 to 6.30 or 7.00 p.m. When the accused persons are facing charge of conspiracy and the role of accused No.3 is emerging to be major in securing the result determined, than the conduct of accused Nos. 2 & 4 in separating themselves under the pretext of their visit to Ahmedabad or Zundal village, is found significant. It is the case of the prosecution that the accused No.2 had directed PW Ghanshyam Bhagat,R/o Navli Gurukul to leave the premises by handing over the key to PW 43 Utsav Tanna, but as Ghanshyam Bhagat and Utsav Tanna both have turned hostile, the prosecution has brought this aspect on record by proving contradictions. However, as observed earlier, such evidence can not be considered as

substantive piece of evidence. Simultaneously, it can be alleged that the prosecution has not attempted to prove these allegations. When a bona fide attempt to prove this aspect has been made by the prosecution, than the act of separation of accused Nos. 2 & 4 from PW Jatin Bhagat and PW Kinjal Joshi becomes relevant. As observed earlier, the selection of PW Jatin Bhagat and PW Kinjal Joshi for attending the function at the place of PW Durgeshbhai Bhatt is found strategic, and so further asking these two prosecution witnesses to return in an auto rickshaw in the midst of the visit, can not be said to be a mere co-incidence, otherwise, both these prosecution witnesses could have been informed before departure from Vadtal temple that they shall have to return in an auto rickshaw as accused Nos. 2 & 3 were required to go to Ahmedabad or Zundal straightway from Nadiad. It is also significant to note that Ahmedabad and Zundal are situated at different distance and directions from the place where they attended the function i.e. Nadiad. This fact is brought on record of the Court by ld.

Counsel Mr. MC Barot who had appeared for some of the accused before the trial Court and who is assisting ld. Sr. Counsel Mr. Thakkar in the present proceedings. It is true that the accused persons are not supposed to prove that they had been to Ahmedabad or Zundal. It is also the settled legal position that the suggestions made by the defence counsel in a criminal trial, are not binding to the accused, but while appreciating the evidence led in the trial, the suggestions made during the cross-examination if are found significant, than such suggestions can be made use of. It is suggested to some of the prosecution witnesses who have been treated as hostile and supported the accused persons directly or indirectly, that accused No.2 Shrijicharan etc. were seen in the late evening of 03.05.1998 in Vadtal Temple complex. If accused No.2 had really gone to Ahmedabad, than he could not have reached Vadtal temple in late evening of 03.05.1998 itself. If they had gone to Zundal, then there was no reason for accused No.2 Shrijicharan to tell PW Jatin Bhagat that they had to go to Ahmedabad also because of the

telephone call from accused No.1 Narayan Shashtri. This game of hancky pancky placed in couple of minutes by the accused becomes significant in the background of the time of death assessed by Dr. Rajkumar Gupta and the place of murder disclosed under a discovery panchanama by PW Vijay Bhagat. In the search list drawn of the properties from the residential part/premises of accused No.3, a car tape is found and we have referred this part of evidence at length earlier. So, the availability of the car tape is also a circumstance vis-a-vis cash amount of Rs.60,000/-. Accused No.3 has not claimed this amount through the Court like the other accused persons. Merely because accused No.3 has not claimed the amount, by itself would not go against him, but recovery of this much of cash amount may become relevant in the background of the motive pleaded by the prosecution. The evidence of PW 17 Jayanti Chandubhai Patel- proprietor of Sahjanand Cold-drinks is found relevant. It is stated by this witness that accused No.2 Shrijicharan is maintaining account (Khata) and he used to

purchase cold-drinks from his shop and on occasions, he was also coming to his shop and had a cold-drink. As per his books of accounts, on 03.05.1998, accused No.2 Shrijicharan had ordered to him cold-drinks. It is stated that the cold-drinks are being sold from his shop in the bottles as well as in tins. So, on 03.05.1998, bottles were not purchased, but seven tins were purchased. It is stated that he himself had given those seven tins to accused No.2 Shrijicharan and at that time, the accused Vijay Bhagat was with accused No.2. He has identified both these accused persons. Copy of the ledger is at exh.155. Cross-examination of this witness made on behalf of accused No.1 confirms, on the contrary, the transaction that has taken place on 03.05.1998. Relations between accused No.2 and this witness were thick and cordial and accused No.2 was his regular customer. It has come on record during the course of cross-examination that on 03.05.1998, he had opened his shop at about 2.30 p.m. and he has consumed cold-drink. He had waited at the shop for some time, say about one hour or one

and half hour. After about 3.30 p.m., he had come with car and thereafter he had returned towards temple. It appears that so far as the time is concerned, this witness has answered the suggestions made on impression because this very accused must have left for Nadiad to attend the function at the place of PW Durgeshbhai Bhatt with PW Jatin Bhagat and PW Kinjal Joshi at about 4.00 to 4.15 p.m. Undisputedly, PW Vijay Bhagat had not accompanied accused No.2 Shrijicharan to Nadiad. It is neither suggested to PW Jatin Bhagat and PW Kinjal Joshi nor it has come on record during the course of cross-examination of the witness that by whom and when these seven tins of cold-drinks purchased by accused No.2 were consumed between 3.30, 3.00 or 3.15 p.m. If the cold-drinks were to be consumed in couple of minutes and that too in the temple premises, whether the purchase would be in a tin or bottle would also be a question, but any inference if drawn on such aspect would be nothing but stretching the fact too far. But, it is the experience that the cold-drinks in tins,

comparatively more costly than the cold-drinks available in bottles, are being purchased and used when they are to be carried out or are required to be preserved in a particular manner so that it can be used so safely. As discussed earlier by this Court, the use of cold-drinks may not have been done by accused persons to dilute tranquilizer tablets allegedly purchased from the shop of PW 20 Mr. Suresh Thakkar, but it can be used for entertainment and also for creating an atmosphere of pleasure and joy. As per the case of the prosecution, about six to seven persons were there at the time of commission of murder at Navli Gurukul Complex, viz. (i) deceased Gadadharanandji himself, (ii) Accused No.3 Madhavprasad, (iii) Vijay Bhagat- a disciple of accused No.3 Madhavprasad who had discovered the fact of place of offence of murder, (iv) Accused No.2 Shrijicharan himself, (v) Accused No.4 Ghanshyam Swami who had separated from Nadiad, (vi) PW Minaxi Patel and (vii) the person who had brought PW Minaxi Patel. Gadadharanandji alone normally would not consume a cold-drink unless somebody joins him

by opening the bottle or tin of a cold-drink. If the case of the prosecution is visualized in the background of the details collected by the investigating agency, the purchase of seven tins of cold-drinks is found significant. It is true that the fact of purchase of seven tins of cold-drinks from the shop of PW Jayantibhai Patel may not become incriminating circumstance against the accused No.2 Shrijicharan and Accused No.4 Vijay Bhagat who had purchased these tins on 03.05.1998 in the afternoon, but a small insignificant looking material available on record can help the other side. There was no reason for this PW Jayantibhai to write down an account (khata) of 03.05.1998 with a view to help the prosecution. That is why the version of this witness has not been assailed seriously in the cross-examination. An attempt to contend made by the defence counsel is that the purchase of seven tins of cold-drinks has no relevance qua the allegations made by the prosecution. This court is not able to understand as to why accused Nos. 1 & 2 have attempted to show that they were not concerned with the office of Chief

Kothari and the defence counsel representing the accused has suggested that they had no role in the management of the affairs of Vadtal temple and mainly in financial affairs. Mr. Thakkar has also attempted to hammer on that point that there is no evidence of convincing nature to show that accused Nos. 1 & 2 were enjoying any important position or place of influence over the financial matters of the temple. Falsity of defence taken by accused is considered to be relevant in a criminal trial and in the opinion of this Court, the falsity of defence should be viewed significantly. It is found to have been taken in a case based on a circumstantial evidence.

(xxxiv) One more circumstance that has come on record is the contact or acquaintance between PW25 Rakshit Shah and accused No.2 Shrijicharan. A pointed question was asked to accused and mainly accused No.2 Shrijicharan as to the use of his mobile telephone and the print-out obtained by the investigating agency from the Cellular Cellphone Service Provider

Company, but he has not denied that he was using cellular telephone of a particular number i.e. 98250 17197 and he has expressed his ignorance about the telephone print out produced vide exh.243. The prosecution has also brought evidence on record to show that PW Rakshit Shah was having telephone connection provided by BSNL bearing subscriber No.32670. This witness Rakshit Shah has been declared hostile and he has supported the accused. This witness has attempted to put curtain on the relations or any type of acquaintance with accused No.2 Shrijicharan for the reasons best known to him. It is not possible to agree with the submission made by ld. Sr.Counsel Mr. Thakkar that telephone print out exh.243 provided by Cellular Telephone Service Provider Company of accused No.2 Shrijicharan only establishes that the subscriber of the cellular phone owned by accused No.2 Shrijicharan had a telephonic conversation with the person at the receiving end of the telephone subscribed by PW Rakshit Shah and in absence of clear evidence or an opportunity to explain the contents of the

telephone print out, the Court should not infer against the accused No.2 Shrijicharan that he had contacts with PW Rakshit Shah who has allegedly arranged for PW Minaxi Patel. The documents exh.242 and 243 reveal that there were telephonic conversations from the telephone subscribed by accused No.2 Shrijicharan with the person holding telephone connection -recipiant of telephone No.32670 on 18.04.1998, 19.04.1998 and 20.04.1998. Duration of conversation was the longest on 20.04.1998 and it was for about 4 minutes. On 19.04.1998, again attempts to contact the recipiant of telephone No.32670 between 8.00 pm. and 9.00 p.m. were made. This very cellular telephone was not used for about 10 days from 04.05.1998 to 13.05.1998 (page 1141 of the paper book). No incoming phone calls were received on the said cellular phone. It is also clear that on 02.04.1998, on two occasions, there were frequent talks between the holder of these two telephone numbers. On the crucial day i.e. on 03.05.1998, the cellular phone owned by accused No.2 Shrijicharan had number of incoming phone calls viz. Total six in

number between 17.10.42 hours and 18.55.41 hours and call duration varied from 7 seconds to 1.25 minutes. Between 18.52 hours and 18.55 hours, there were four incoming calls (both inclusive of) which according to the prosecution is the crucial period. Ld. Counsel Mr. Ravani appearing for CBI has submitted that in those days, it was not possible to trace the location of tower and in turn location of the caller of the call, as discussed earlier. On 04.05.1998, the very holder of the telephone i.e. cellular phone of accused No.2 Shrijicharan, had received one telephone call on 00.15.47 hours i.e. immediately after the mid-night and the duration of the talk was 4.55 minutes. This aspect should be considered vis-a-vis the fact that very telephone had not received any telephone call during the period of 10 days as stated earlier, nor it was used by the subscriber during that period. Telephonic conversation had started for the first time on 03.05.1998 and number of long distance calls were made after 18.05.1998 from this very telephone number. It would not be possible for the Court to observe that accused

No.2 or anybody from his cellular phone may have talks with the wife or any other members of the family of PW Rakshit Shah and that PW Rakshit Shah was not even knowing accused No.2 Shrijicharan as pretended by him. Accused No.2 Shrijicharan himself has admitted in his statement under section 313 of CrPC that he himself had made a telephone call to Surat so that PW Jatin Bhagat can talk to PW Kapilbhai. This conduct of accused No.2 supports PW Jatin that anxious attempts to trace out the presence of Guru Gadadharanandji had started any time prior to 9.00 p.m. on 03.05.1998. With these documents exh.242 & 243, the prosecution has established that accused No.2 and PW Rakshit Shah have relations or acquaintance because the very print out shows that there after even in the month of June & July 1998 also, both the subscribers had telephonic conversation i.e. on 30.06.1998 and 10.07.1998.

(xxxv) Evidence of PW 32 Mafatbhai Ranchhodbhai Oza, as discussed earlier, proves that PW Minaxi was called by CBI and she was

shown photographs of deceased Gadadharanandji in presence of this witness and she had identified deceased Gadadharanandji from the photographs shown to her. Thus, there is cogent evidence to show that PW Minaxi was actually taken on scooter to Navli Gurukul by PW Rakshit Shah as alleged and Utsav Tanna has also played some role because all these three witnesses have turned hostile. However, the investigating agency had attempted to trace out the cause why deceased Guru Gadadharanandji had left Vadtal temple with accused No.3 Madhavprasad by pushing his disciple out of temple premises who was actually present in the room with PW Ismail Vora (rickshaw-wala). So, this part of evidence is hazzy, but simultaneously, it is possible to observe that this is not the area where it is possible to observe that there is no legal evidence or that there is “nil” evidence.

(xxxvi) The Court is aware that the evidence as to the character of an individual accused is inadmissible in evidence unless it is otherwise proved in accordance with law. So, the

photographs and other articles seized and collected from the residential portion of the accused persons i.e. accused Nos. 1,2 & 5, though are available to the Court and we have considered them as articles as we have seen those articles, but except some of the documents that have been tendered in evidence or sent to expert for analysis, these articles can not be used as incriminating against the accused. However, the collection of cash amount and the fact that investment of huge sum in various deposits and funds with the banks and financial institutions or financial companies can be considered because they are relevant in the background of the motive pleaded by the prosecution. When there is no denial about the recovery of cash and other valuables like FDRs, Investment Bonds etc., these documents can be considered and looked into. An attempt was made by accused No.1,2 and one Swami Ghyanprakashdasji Guru Hariprakashdasji to get the muddamal valuables which were lying in the custody of CBI vide application exh.04.10.1999. Reliefs prayed by the applicants of that

application are found interesting and relevant and we have read the relevant clause 6(A) of the application which is there in the record received from the trial Court because it is ordered by the ld. Trial Judge that the accused persons should be asked to return the valuables received by them in the operative part of the judgment. Paras 4 & 5 of the application claiming valuables, is the claim made by accused Nos. 2 & 1 respectively. One of the search list prepared in presence of panchas i.e. exh.244 & 246 have been admitted in evidence on the consent by the ld. Counsel appearing for the accused and it is not even denied that the documents as to investment of huge amount were found from the residence of these two accused persons. From the residence of accused No.1 Narayan Shashtri, cash amount of Rs.3,15,500/ was recovered and documents as to investment of the amount worth about Rs.4 Lac were also found. Exact amount invested in Kishan Vikash Patra (KVP) and Fixed Deposit Receipts (FDRs) etc. by accused No.2 has not been mentioned by the investigating agency in the search list exh.246.

The exact figure was not disclosed in the application filed by them on 04.10.1999. The application says that applicant No.1 Swami Ghyanprakashdasji was also once considered as an accused, but at the time of filing of the chargesheet, he was not arraigned as an accused. Once this Ghyanprakashdasji was arrested and granted bail by the Court of Sessions, but according to IO, accused persons were handed over valuables, temporarily and on condition that they shall reproduce those documents as and when ordered by the Court under section 43(1) of CrPC, after obtaining a bond of Rs.5 Lakh from each of the accused i.e. accused Nos. 1 & 2. When it is in evidence that both the accused Nos. 1 & 2 are sadhus and has renounced the worldly affairs (sansar), they were not supposed to keep personal properties. How and why this much cash amount was found from the residence of accused No.1 and how accused Nos. 1 & 2 were able to collect and invest huge amount either in their names or in the name of their Guru or Gurubhai or disciple, needs explanation. While approaching the Court vide application under

section 451 of CrPC, none of these accused persons i.e. accused Nos. 1 & 2 have stated anything about the legitimacy and genuineness of their claim qua the valuables. On the contrary, in their statements under section 313 of CrPC, they have again admitted about this recovery. So, this circumstance does not look incriminating against the accused apparently and collection of such a property even as Sanyasi or Sadhu who has renounced the world, can not be said to be inconsistent with their innocence, but the motive pleaded by the prosecution if considered, then non-explanation or unconvincing explanation of recovery of such valuables can be used as an evidence in support of other evidence collected by the prosecution to prove the motive. As per section 3 of the Indian Evidence Act, as observed earlier, the fact relevant to a relevant fact is relevant and, therefore, absence of explanation on this part of evidence collected by the prosecution can go against both these accused. In the same way, accused No.3, of course, has not admitted the search list exh.235 & 236, but

as mentioned earlier, cash amount of Rs.60,000/ was also recovered during that search. It was not possible either for CBI or for panchas to plant this much of cash amount with a view to create evidence against accused No.3. It is not the say of either accused No.1 or accused No.2 that more amount than the amount actually shown in the search list was recovered from the residence of accused No.1 and part thereof has been shown as amount recovered from the resident of accused No.3. It is true that a pointed question has not been asked to accused No.3 as to what he has to say about the cash amount found from his residence along with other articles. These two search lists exh.235 and 236 have been tendered in evidence by PW 45 Mahendra Vyas. He was taken from Ahmedabad and at the relevant point of time, he was serving in Zonal Office of SBI. This witness has stated in the cross-examination that search was carried out by CBI personnels and thereafter they had come to the office of Kothari and each item seized were shown to them as panchas and thereafter he had signed the search list. So, the recovery is

found genuine and he has denied the suggestion that they have simply signed the search list at the instance of CBI officers. It is not even suggested to this witness that Rs.60,000/ have not been found out and recovered during the search carried out on 28.03.1999. In response to the question asked by the Court while recorded statement under section 313 of CrPC, the accused No.3 has stated that he does not know whether the search list prepared, but he has signed the search list because he was asked to sign by CBI Officers. He has stated that panchas have not signed the list in his presence. In our view, the evidence collected vide search list exh.235 & 236 is the evidence based on genuine recovery of the articles. We have discussed this part of evidence earlier when we had dealt with recovery of car tape that was found from the residence during the search. On the same grounds, we are inclined to accept that the prosecution has successfully established the recovery of the amount of Rs.60,000/ from accused No.3 Madhavprasad. The accused has remained silent when he was asked

the question qua both these search lists and mainly exh.235 showing recovery of Rs.60,000/-.

(xxxvii)(a) One set of arguments advanced on behalf of the accused side that the deceased had good relations with every one except Nautam Swami and Premswarupdas Swami, would not help them. Some extraneous facts also have been brought to the notice of the Court saying that that very Nautam swami who was arrested as one of the suspects and having inimical terms with the deceased when he became Chief Kothari and presently he is the Chairman of the Temple Trust Board, can not be considered to disprove the evidence by the prosecution. It is true that Nautam swami and Premswarupdas swami were having inimical feeling towards deceased Gadadharanandji and they had no cordial terms. This fact is also admitted by PW Jatin Bhagat, but therefore only, those two had a motive to kill Gadadharanandji is not an acceptable proposition. It is rightly argued that from all angles, the investigation was carried out and nothing adverse otherwise than having some rival

feelings or inimical feelings were found by investigating agency and, therefore, both these suspects were not chargesheeted. Merely because, the witnesses who have seen the deceased going with accused No.3 in a blue colour car have not given the exact date and time, would not make the evidence led by the prosecution doubtful when these two persons were also having inimical feelings against the deceased. Evidence of witness has to be read in reference to the context of the entire story told by them and the answers given by the accused should be construed to have been given in reference to the incident of 03.05.1998. It is in evidence that accused No.3 was residing with P.W.11 Laxmiprasad being disciple of his Gurubhai and thereafter nobody else was seen residing with that very PW Laxmiprasad after arrest of accused No.3. So, some facts stated by Laxmiprasad in favour of accused persons are also not found useful to the accused. On the contrary, it gives an impression that these witnesses have been won over and even than the some facts stated by such witnesses are found helpful to the prosecution.

The fact of arrest of Hashmukhbhai accepted by PW 16 Chimanbhai also is not found useful as argued by ld. Sr.Counsel Mr. Thakkar to disprove the evidence led by the prosecution. In the same way, deposition of PW Mohammad Shaikh- a guaragewala- wherein he has given description of the vehicle lying in his guarage, also would not help the accused persons to establish that actually a blue colour maruti van bearing No. GJ-61-1894 had dashed with the tree and because of the fire on account of leakage of gas, roof-top of the vehicle had also gone off. On the contrary, one of the photographs produced suggest that roof top initially was over the car and it is not seen it having gone off. There is no detailed cross-examination of the Surveyor PW Arvindbhai whereby he has proved the report prepared by him containing the findings recorded therein i.e. his opinion as an expert surveyor. The Court normally should not put itself in the chair of an expert, but it is also the duty of the Court to see that the documents if produced in the nature of photographs and if it is possible to draw any inference from the facts

and details visible, than appropriate observations can be made by the Court. On seeing one of the photographs of the front portion of the motor vehicle found just lying near the tree, it reveals that there are no marks of dashing either on the car or on the tree seen in that photograph, otherwise, the iron rod fixed on the bumper to get a special protection as well as bumper both would have received a dent vis-a-vis an impact on the tree. So, the evidence of guaragewala Mr. Shaikh and answers given by this witness during the course of cross-examination is not sufficient to create any doubt qua the opinion expressed by FSL Expert Scientist as well as Surveyor PW Arvindbhai.

(b) An infirm or a weak type of evidence brought on record by the prosecution if is found helpful to the accused, it can be used in favour of the accused and if it is found useful to the prosecution, then the same would increase the strength of the case of the prosecution and the evidence of the witnesses of this type of

infirmity, can be used in favour of prosecution. But if it is found that this evidence because of infirmity or inadequacy or weakness can not be used safely in favour of the prosecution, then such type of a weak evidence should not be considered as an evidence against the prosecution in absence of other demerit. The Courts are supposed to keep aside such a weak and infirm type of evidence. In the present case, evidence of shop-keeper PW 20 Suresh Thakkar running a medical store, would not help the prosecution because it is not possible for the Court to accept that he had given tranquilizer tablets (William .05 mg.) to accused No.2 Shrijicharan without prescription and without obtaining any consideration as that being a scheduled drug. When this evidence is found a weak and untrustworthy piece of evidence, it would not help the prosecution. In the same way, the evidence of PW 19 Jignesh Kanubhai Soni (exh.158) also would not help the prosecution much whereby he had proved that accused Vijay Bhagat had been to his shop at Anand to get a gold chain of Rudraksha repaired

and also with one another gold chain made of “Tulsi Para (Bead)” along with one gold amulet (madaliyu) and in exchange of these two gold articles, he had given a gold chain to accused Vijay Bhagat. In absence of any cogent documentary evidence, the oral evidence should not be accepted as reliable piece of evidence. This witness was supposed to lead the best evidence and that was possible by showing entries of sale, purchase or exchange of gold articles. On the contrary, the answers given by this witness, in the cross-examination, are found evasive. The document produced by this witness in evidence was, according to this witness, given to accused Vijay Bhagat in the month of May 1998, but this witness was not having any copy of it even on the date on which his statement was recorded by the IO. The investigating agency has not even recovered any gold chain from accused Vijay Bhagat otherwise that very gold chain could have been shown to the witness because a goldsmith is able to identify the ornaments, normally, either prepared by him or sold by him. It appears that

the investigating agency, with a view to settle the account as to missing gold ornaments that were put on by deceased Guru Gadadharanandji, has examined this witness. This witness might be telling truth or otherwise than truth. So, such a hazy evidence would not help the prosecution. Simultaneously, it would not affect adversely to the strength of other parts of evidence. The prosecution, according to us, was not supposed to even prove that where the articles that were put on by the deceased have gone. The marks that were seen by Dr. Raju Gupta while preparing post-mortem note, gives an impression that the deceased was putting on a ring on the small finger of his left hand and marks of this ring were seen by the doctor on the finger while performing post-mortem notes on the body of the deceased. The investigating agency has not collected any evidence qua that ring as well as qua the allegations as to the exchange of gold ornaments by accused Vijay Bhagat from PW Soni Jignesh Kanubhai, is not found reliable or convincing evidence. But this would not go against the prosecution. At the most, the Court

can observe that this part of evidence does not carry the case of the prosecution any further being unreliable and infirm piece of evidence.

(c) One more circumstance collected by the prosecution against accused No.1 is about his handwriting that were found in questioned documents. Accused Nos. 1 & 2 themselves have admitted while responding question asked by the trial court while recording their statement under section 313 of CrPC that accused No.1 was Asstt. Kothari and accused No.2 was also Assistant to Kothari. The argument placed before us is that they had no role to play in the purchase of valuables and other properties, materials etc. including cash received by the office of Kothari of Vadtal Temple. This evidence is collected to bring the motive alleged by the prosecution on record. It is proved that the handwriting of the accused persons were taken in presence of the panchas and sent to handwriting expert for examination so that the specimen handwriting can be compared with the questioned document. Evidence

led by PW 61 Krishna Shashtri Pananyala (exh.286) reveals that a requisition exh.275 sent by SP, CBI, Navi Mumbai to the office of GPOG, Hyderabad was nothing, but a request to give an opinion on the questioned document as per the questionnaire sent by SP, CBI, New Mumbai. It is specifically mentioned in the letter that the questioned documents are in good condition. The office of this witness had received one bunch of papers from file No.6 containing page Nos. 1 to 359. The details of those documents are there on record. The list of specimen writings obtained from accused Nos. 1 & 2 i.e. Narayan Shashtri and Shrijicharan Swami, were also sent along with specimen handwritings of Premvantinand Swami. It is stated by this witness that all the original documents sent to his office were examined by him as well as by Shri Goel, the then Government Examiner of questioned documents independently. It would be beneficial to reproduce the opinion expressed by this witness qua accused Nos. 1 & 2 which is there in paras 3(i) & 3(ii) of his deposition:-

3(i) The person who wrote the blue enclosure

writing stamped and marked S-1 to S-12. Also wrote the red enclosed writing printed stamped and marked Q.1, Q.2, Q.4 to Q.19, Q.19/1, Q.20 to .40, Q.42 to Q.49, Q.49/1 to Q.50 to Q.57, Q.59 to Q.64, Q.77, Q.78 & Q.182.

3(ii)The person who wrote the blue enclose writing stamped & marked as S.13 to S.33 also wrote the red enclosed writing similarly stamped and marked Q.65 to Q.76, Q.79 to Q.114, Q.117 to Q.119, Q.123, Q.125 to Q.135, Q.157, Q.160, Q.179, Q.181 and Q.183.

It is in evidence that S.1 to S.12 are the specimen handwritings of accused No.1 Narayan Swami and S.13 to 33 are the specimen handwriting of accused No.2 Shrijicharan. This witness has also proved the opinion expressed by Mr. Goel. The reasons for opinion and the opinion expressed are at exh.287 & 288. We have carefully seen the documents examined by the expert in the handwritings of accused Nos. 1 & 2 and this opinion is sufficient to prove that

both the accused i.e. accused Nos. 1 & 2 were active in financial matters including the purchases that were made for the temple and Bhojanalaya being run by the temple. Specimen writings obtained during the course of investigation are at exh.294 & 295 and questioned documents covered under file Nos. 4 & 5 seized from the residence of accused No.1 Narayan Shashtri is at exh.245. So, the documents bearing handwritings of accused No.1 Narayan Shashtri were also found on the file seized from the residence of accused No.1 Narayan Shashtri. The important aspect is that these files were not found lying in the office of the Temple Board Trust nor in the cup-board of Chief Khothari Bhakti Kishoredasji. The figures shown as to the purchase of Ghee, Sugar, edible oil, rice, wheat, other spices etc. reveal that the purchases made on behalf of the Temple Board Trust for maintenance of the main temple at Vadtal, were to the tune of lacs of rupees per year. It is true that opinion of the handwriting expert is not considered as exact opinion on account of certain limitations that

are there with the signs/markings of handwriting analyzed and examination, but when the prosecution is able to lead any evidence which can be said to be convincing, then the opinion expressed by the handwriting expert can be said to be reliable. It is satisfactorily proved as earlier that accused Nos. 1 & 2 were in the office of Chief Kothari Bhakti Kishoredasji, being a person infirm and not capable of dealing with day to day affairs of the office of the Chief Kothari, these two accused i.e. accused Nos. 1 & 2 were in the office of Chief Kothari and assist them. As observed earlier, on occasions, both the accused themselves were posing themselves as Kothari of Vadtal temple even in public. Accused No.1 has admitted as stated earlier, that he was working as Astt. Kothari in Vadtal Temple while responding to the question asked by the Court while recording their statements under section 313 of CrPC (Question No.57). Accused Nos. 1 & 2 have admitted that Chief Kothari is also an administrator and cashier and he is authorized to deal in the financial matters while giving

answer to Q.78 asked by the Court while recording their statements under section 313 of CrPC. PW 22 Babubhai Haricharan who knows accused No.1 Narayan Shashtri also has identified the handwriting of accused No.1 in the documents shown to him produced vide mark 26/7 (exh.245). These documents are questioned documents covered under File Nos. 4 & 6 seized from accused No.1 Narayan Shashtri. This witness has supported many accused and he was declared hostile. However, he does not dispute the genuineness of the handwriting of accused No.1 in the questioned document exh.245. In this background, we find that the opinion expressed by the handwriting expert is a reliable piece of evidence and it is found useful to the prosecution.

(xxxviii) The prosecution has pleaded a motive behind the commission of the offence against accused and they have been posed as conspirators mainly for the offence of murder and that way elimination of Chairman of Temple Board Trust namely Gadadharanandji. As this case is based on circumstantial evidence, the case as to commission

of the crime placed by the prosecution plays an important role, but as observed by the Apex Court in the case of **State of U.P. V/s Babu Ram, (2000)4 SCC 515,** the failure to prove the motive does not decrease the otherwise well available incriminating circumstances. The prosecution is supposed to prove the motive of the crime, if pleaded, in a satisfactory manner or at the most even sincere attempts to prove the motive by bringing direct or indirect evidence as to the motive on record, according to us, should be treated as sufficient because it is also one another accepted proposition of law that motive is always hidden in the minds of the accused and it would be difficult for the prosecution to bring out that hidden motive. It is also one another settled legal proposition that motive is, if inferable from the conduct of the accused, either prior to the commission of the offence or even after the commission of the offence, can help the Court in inferring whether the prosecution has proved the motive or commission of offence and the crime in a satisfactory manner or not. Here, we would like to reproduce the relevant part of the decision in the case of ***State of UP v/s Babu Ram (supra)***, where the apex Court has said :-

" We are unable to concur with the legal proposition adumbrated in the impugned judgment that motive may not be very much material in cases depending on direct evidence whereas motive is material only when the case depends upon circumstantial evidence. There is no legal warrant for making such a hiatus in criminal cases as for the motive for committing the crime. Motive is a relevant factor in all criminal cases whether based on the testimony of eye-witnesses or circumstantial evidence. The question in this regard is whether the prosecution must fail because it failed to prove the motive or even whether inability to prove motive would weaken the prosecution to any perceptible limit. No doubt, if the prosecution proves the existence of a motive it would be well and good for it, particularly in a case depending on circumstantial evidence, for such motive could then be counted as one of the circumstances. However, it cannot be forgotten that it is generally a different area for any prosecution to bring on record what was in the mind of the respondent. Even if the Investigating Officer would have succeeded in knowing it through interrogations that can not

be put in evidence by them due to the ban imposed by law."

The observations made by the Apex Court in the case of **Nathuni Yadav v/s State of Bihar, AIR 1997 SC 1808** and in the case of **State of Himachal Pradesh v/s Jeet Singh, 1999(2) JT (SC) 999,** are also found relevant for the present decision. The Apex Court, in the case of Jeet Singh, has observed as under:-

"33. No doubt, it is a sound principle to remember that every criminal act was done with a motive but its corollary is not that no criminal offence would have been committed if prosecution has failed to prove the precise motive of the accused to commit it. When the prosecution succeeded in showing the possibility of some ire for the accused towards the victim the inability to further put on record the manner in which such ire would have swelled up in the mind of the offender to such a degree as to impel him to commit the offence can not be construed as a fatal weakness of the prosecution. It is almost an impossibility for the prosecution to unravel the full dimension of the mental disposition of

an offender towards the person whom he offended.”

The evidence with regard to last seen theory i.e. “the deceased last seen together in the company of the accused”, is such a circumstance that even if the failure to lead evidence as to motive as to the commission of the crime, would not hamper the case of the prosecution in absence of the proof as to the motive of the commission of a crime, but this would link only accused No.3 with the crime because the very accused had pointed out the place where the dead body of the deceased Gadadharanandji was thrown in the sim of village Barothi, State of Rajasthan. So, when certain facts are found proved by credible evidence, then the standard in appreciating the evidence led as to the motive would be different in light of the ratio propounded in the above-cited decision.

(xxxix) The consequences of evidence placed by the prosecution shows that the relations of the accused with deceased Gadadharanandji were cordial and were not found inimical even on 03.05.1998 and the election of the deceased Guru Gadadharanandji as Chairman of Temple Board Trust on 11.04.1998 was an

event when a Sansari Chairman was replaced by a Sadhu. As per the scheme, any elected member of Temple Board Trust was entitled to become a Chairman and on 11.04.1998, deceased Gadadharanandji became the Chairman. This fact is not disputed. The prosecution has proved this fact by producing relevant documentary evidence that immediately after resumption, deceased Gadadharanandji had disclosed his intention to reshuffle Sadhus and Tyagis who have been serving and enjoying the position of kotharis/poojaris. In absence of evidence, it can be reasonably said that the intention that was there in the mind of newly elected Chairman Gadadharanandji would not have remained that secret but the mind of Chairman Gadadharanandji can be said to have been found crystallized in the nature of agenda dated 16.05.1998 (exh.121). File containing zerox copies of the agendas, proceedings etc. of the Temple Board Trust meetings from 08.11.1995 to 14.12.1997 was seized during the investigation along with the zerox copy of the agenda of the meeting held on 11.04.1998 and 22.04.1998, by the IO. The receipt is given by the IO Mr. Krishikar at exh.122. Item No.6 deals with the subject pertaining to the administration of Vadtal as well as other different temples under the Vadtal Gadi including Hari Mandir.

Item No.2 of the agenda is regarding appointment of Kotharis/poojaris including their transfers and if need be to consider the retirement of the persons enjoying this position. Of course, item No.1, in our view, has become relevant on appreciation of evidence led by the prosecution qua the motive of the crime and item No.1 is regarding handing over and taking over the accounts and signing the relevant account books etc. because of the change in chairmanship. The meeting of the temple committee was held on 22.04.1998 and it is in evidence that there was big hue and cry in the said meeting. Evidence of PW Jatin Bhagat and PW Kinjal Joshi corroborates each other. It is stated by PW Jatin that deceased Gadadharanandji was the member of the Board of Trustees since about 15 years and in the month of may 1998, he was intending to transfer the Kotharis and, therefore, he had undertaken that work by issuing necessary agendas. PW 22 Babubhai Guru Haricharandas (exh.161), one of the trustees examined, has stated that meeting of 11.04.1998 was presided over by the Chairman Hashmukhbhai Patel and in that meeting, Gadadharanandji was elected as new Chairman. Minutes of the meeting is produced and proved vide exh.116. One resolution exh.117 of 22.04.1998 is also proved by this witness. Attention

of this Court is drawn to the resolution No.2-A of exh.117. The resolution is tilted as agenda circulated by the President for appointment/transfer and retirement of Kotharis and Poojaris of the temples. It is specifically mentioned in all these resolutions passed in that meeting (exh.117) that Kothari of Vadtal Temple had not cast vote because as per the scheme, Chief Kothari of Vadtal main temple is given status of a member of the Trustee Board, but he is not entitled to cast vote in the meeting of Temple Board Trust. Resolution No.2-A says thus:-

> " After due deliberations and discussions, it is resolved to retire Ghanshyamnandji Guru Nirasswami as Poojari of Vadtal Temple and in his place, one Jagdishanandji Guru Nirasswadanandji is hereby appointed as Poojari. He shall take over the charge after filing affidavit."

After reading this resolution, PW Babubhai had stated that after discussing the issue of transferring Kotharis, no decision probably is taken and because of differences in opinion, decision may not have been taken. This witness is treated

hostile. This hostile witness has stated that the issue as to the transfer of Kothari of the temple at least was discussed.

(xl) In the opinion of the Court, the evidence of PW 5 Yashwant Bapalal Trivedi exh.113 who was the Manager of Vadtal Swaminarayan Temple, is relevant qua the evidence as to the motive of the crime, whereby he has stated that the appointment of Kothari is in the hands of the members of the Trust Board. The Board has seven members as per the Scheme. Each temple under the main Vadtal Gadi does have the post of Kothari including the administration of Hari Mandir which is also under the Temple Board Trust, is one fact which is not disputed before this Court. There is no fixed period for a person who has appointed as a Kothari. It appears to be an office of pleasure till and so long as anything adverse is decided by the Board of Trustees, one enjoys that position. Anybody from the group of Sadhus can be posted as Chief Kothari and Kothari can be dismissed by the members of the Board. Chief Kothari of Vadtal main temple deals with the administration as well as financial affairs of the main temple and Kotharis of respective temples under Vadtal Gadi are responsible for the

administration and financial matters of that particular/ respective temple. The decision as to the Board of Trustees and preparation of agenda is being done from the office of the Chairman and agenda is circulated with the signature of the Chairman. Agenda is prepared as per the instructions of the Chairman. Coram is of four persons. According to this witness, in April-1998, Shri Bhakti Kishoredasji was the Chief Kothari of Vadtal temple and he had taken over as such in the year 1997. Accused No.1 Narayan Shashtri was appointed as Asstt. Kothari. Normally, seven clear days' notice is given. This witness has proved the resolutions exh.116 & 117 referred to herein above and is found in the handwriting of one Natubhai. Resolution No. 2-B passed along with Resolution No. 2-A clearly shows that one Poojari of temple known as “Ram Pratap Bungalow” was also made to retire and one another Sadhu was appointed as Poojari. of that temple. Resolution No.2-C is with regard to retirement of Kothari of Malegaon Temple (State of Maharashtra) and it was resolved to appoint some other Sadhu as Kothari of Malegaon temple. It is significant to note that according to this witness as well as the documents produced, in the meeting of 11.05.1998, absence has been marked of Chairman

Gadadharanandji and that meeting was presided over by Hashmukhbhai Ranchhodbhai Patel. In resolution No.1 of the meeting of 11.05.1998, it is recorded that the members of the Trust Board express their anguish and decided to adjourn further proceedings as there was no trace as to whereabout of missing Chairman Gadadharanandji. This witness has accepted that in the agenda exh.117, there is no specific reference name-wise or temple-wise qua agenda item No.2. This witness has admitted that discussion on agenda item No.2 was treated concluded after passing resolution Nos. 2A, 2B and 2C. PW No.14 Nagjibhai Kanjibhai Patel (exh.225) of course is examined, but he has not thrown any light on the item No.2 of the agenda circulated in the meeting of 16.04.1998. It is true that there is no specific reference as to transfer or proposed change for the post of Chief Kothari of Vadtal temple in agenda item No.2, but three different resolutions passed on that day in the meeting clearly suggests that deliberations were to be made by the members of the Board on the proposal that may be made by the Chairman. Considering the constitutional position of the Chairman and his authority to move items for discussion, he himself must have moved the proposal as to the transfer of Kotharis and poojaris of three

different temples, otherwise there was no reference specifically qua the transfer or retirement of either Kotharis or poojaris of three different temples including temple situated at Malegaon (Maharashtra). So, the arguments placed by ld. Sr.Counsel Mr. Thakkar that everything was concluded in the meeting qua the agenda item No.2 and there is no evidence that Gadadharanandji had ever thought of transfer of Chief Kothari of Vadtal Temple, is not found acceptable. A person who was in the Board of Trustees for several years and had undertaken the work of transfer of Kotharis and Poojaris including the work to make some of them to retire from the post, is found to have deliberated to achieve a particular goal that must be there in the mind of Gadadharanandji as Chairman, otherwise, as newly elected Chairman in the first meeting that he was to preside over, would not appoint three persons as resolved by the Board of Trustees. It is in evidence that after circulation of this agenda, there was hue and cry and rumour as to transfer of Chief Kothari of Vadtal Temple. It is true that the evidence led by PW Kinjal Joshi about the over-hearing of the telephonic conversation between Chairman Gadadharanandji and Acharya Maharaj is a weak piece of evidence, but the fact remains that everybody

including Acharya Maharaj were suspecting the movement of proposal as to the transfer of Chief Kothari of Vadtal main temple. The issue of transfer of Chief Kothari of the main temple could have been discussed and decided in that very meeting like other three items and it has come on record that because of some obstructions and differences in opinion, all the proposals under item No.2 were not fully discussed or were taken to their logical end by passing appropriate resolutions. It is in evidence that accused Nos. 1 & 2 had entered into administration of Navli Gurukul along with Chief Kothari Bhakti Kishoredasji in the year 1997 i.e. after appointment of Bhakti Kishoredasji as Chief Kothari of Vadtal Temple if the documents are read in reference to the context to the evidence led by the Manager of the temple viz. PW Yashwant Trivedi and resolutions passed by Temple Board Trust as well as deposition of Ex-trustee of Swaminarayan Gurukul Trust, Navli (exh.139). In the evidence of PW Kinjal Joshi, it has come on record that Guru Gadadharanandji had received a telephone call from Acharya Maharaj and thereafter at about 12.00 midnight, Acharya Maharaj had come to Vadtal temple and he was sitting in the office of the Chief Kothari. Thereafter, accused No.2 Shrijicharan Swami

had gone to call Guru Gadadharanandji and Gadadharanandji was asked to come saying that “Acharya Maharaj has some work and therefore he is calling you”. Gadadharanandji had replied that he would not come right now, but he can come in the morning. Thereafter, accused No.2 Shrijicharan Swami told Gadadharanandji to talk to Acharya Maharaj. Thereafter, Gadadharanandji had a telephonic talk. Acharya Maharaj also asked Gadadharanandji to come down, but he refused. It is in evidence of this witness that he was all the while present in the room of his Guru and Gadadharanandji was being called on the issue of transfer of Kothari. Gadadharanandji was also asked that if he is not inclined to come then Acharya Maharaj himself may come to him, but Gadadharanandji had requested Acharya Maharaj that “he is the “Gadipati” (a person adorning Gadi-the Highest Post) and, therefore, he should not come.” During this talk, accused No.1 had come to the room of Gadadharanandji and at that time, the discussion as to the issue of transfer of Kothari was going on in telephonic talk and accused No.1 Narayan Shashtri told angrily to deceased Gadadharanandji that “if you transfer, they may create disturbance (Toofan)- commotion”. During the course of cross-examination, this part of

evidence has stood to the test. It is true that the witness has accepted that the facts stated by him before the Court were not stated by him before the Chaklashi Police or CID Crimes. This court has discussed this aspect earlier, but it is clear that Chaklashi police was trying to trace out Guru Gadadharanandji and actual crime was neither registered nor investigated by Chaklashi Police. Chaklashi Police was in charge of the inquiry regarding missing entry from 05.05.1998 to 08.05.1998. Thereafter, Nadiad Town Police had taken over that inquiry and in turn the papers were sent to LCB (Local Crime Branch) on 12.05.1998. Thereafter, State CID Crimes took over the subject inquiry on 15-16.05.1998. The witnesses examined on behalf of these three investigating agencies clearly have stated that they had not carried out investigation nor such evidence has come on record that any investigation from the angle that CBI had adopted, was carried out by any of these three investigating agencies. As such, no such statement treating missing Guru Gadadharanandji as abducted, confined or killed were recorded by any of these three agencies. So, it would not be logical to propose to the witnesses including PW Kinjal Joshi that he had not stated certain things which are

brought on record by way of contradictions before Chaklashi Police or CID crimes. The statement recorded by CID crimes dated 16.05.1998 of this witness appears to be a casual recording of a statement. It is also important to note that accused No.1 Narayan Shashtri who had expressed displeasure in an arrogant way on the issue of transfer of Kothari, according to PW Kinjal and PW Jatin, had no inimical terms with the deceased. He was enjoying the position of Asstt. Kothari even after the first meeting and accused No.2 Shrijicharan Swami when was with him at Nadiad on the day on which Guru Gadadharanandji was found missing, he may not have even an iota of doubt on these two accused persons. Accused No.2 Shrijicharan Swami was Asstt. to Kothari and working with accused No.1 Narayan Shashtri, is the evidence. So, absence of facts stated by this witness before CBI and to the Court, should not be treated as serious infirmity or material contradiction in the nature of improvement. On the contrary, his say before the Court can be said to be consistent qua the facts revealed by him before CBI otherwise, the defence side could have brought on record and proved the contradictions. It is clear from the evidence that there was a pressure from Acharya Maharaj Ajendraprasadji and under

resistance or pressure, no discussion had taken place qua the transfer of Kothari of main temple i.e. Vadtal temple. Witnesses examined by the prosecution i.e. PW Shashtri Hariprakashdasji (Exh.160), PW Premvatinand Guru Harikrishna (exh.207), have not supported the case of the prosecution on the point, but it emerges from the record that there was a signature campaign on the issue of transfer of the Chief Kothari. Evidence of PW Kapilbhai Joshi (exh.211) clearly indicates that some apprehension was expressed before him by Premswarup Swami because Gadadharanandji had started thinking to transfer the Kothari of the temple and that apprehension was conveyed to Gadadharanandji. It is true that the facts stated by this witness in his examination-in-chief was not the version before the CID Crimes, but it is clear that things that were in the mind of deceased Gadadharanandji was a matter of knowledge or information of number of persons including PW Kinjal Joshi and Premswarup Swami etc. So, in the event of transfer of Chief Kothari of Vadtal main temple, the position of accused Nos. 1 & 2 would change. It is inferable that a new Chief Kothari may select the person of his confidence or if he is healthy man, even may not appoint or select anybody to work as Asstt.

Kothari. Constitutionally as such there is no post of Asstt. Kothari but the administration of such a huge institution being a complexed issue, a permanent Asstt. to Chief Kothari may be the need and such a person obviously may be addressed as Asstt. Kothari. If the assisting persons are more than one, those one or two persons may be addressed and treated as Assistant to Kothari. This situation was a matter of concern qua accused Nos.1 & 2. It is the say of the prosecution and argued by Mr. Ravani, ld. Counsel appearing for CBI that accused Nos. 1 & 2 were enjoying creamy position in the office of Kothari as they were mainly dealing with administration and financial matters of the main temple having huge income and expenditure. So, the authority to collect money and accumulate the same on behalf of Temple Board Trust as well as Vadtal main temple and to spend them, whether it is badly required or not as per their discretion, was within the domain of Chief Kothari and as mentioned earlier, Chief Kothari Bhakti Kishoredasji being not that physically fit and active in administration, accused Nos. 1 & 2 were working as de-facto Kothari. So, the evidence led by the prosecution that has been discussed by this Court earlier while dealing with search and seizure panchanama exh.244 and

bills and vouchers of purchase of material etc. from the file exh.245, mainly proved to be in the handwriting of accused No.1, adds strength to the say of the prosecution qua motive. WE have no reason to discard the arguments advanced by ld. Counsel Mr. Ravani for CBI that extra huge income was available to accused Nos. 1 & 2 on account of their position as Asstt. Kothari and the persons dealing in transactions of purchasing material for temple and the trace or feelings of animosity that was there in the mind of accused Nos. 1 & 2 may not have been noticed by surrounding people including PW Jatin Bhagat and PW Kinjal Joshi or other persons like PW Nazisms, PW Chi man Par mar and PW Ismail Vora. In our country, people are being kidnapped or murdered for petty reasons. Of course, the Court can not take judicial notice of this aspect at all, but when the allegation of the prosecution is that the apprehension to loose creamy position in the office of Chief Kothari has tempted accused Nos. 1 & 2 to find out a way, may be in the nature of a permanent solution. Mr. Ravani, ld. Counsel appearing for CBI has attempted to point out that there were frequent meetings in between and apprehension of Chief Kothari appears to be was that before anything is disclosed qua missing Guru, he himself may loose the

status and membership on account of his consistent absence in the meetings called by Temple Board Trust. For the sake of arguments even if we ignore this submission, than also, it is clear that an attempt to visit Vadtal temple at odd hours i.e. at 12.00 midnight and action of sending accused No.2 Shrijicharan Swami to call Guru Gadadharanandji is found to be important incriminating evidence. Refusal by Gadadharanandji to come at late hours must have given rise to number of thoughts especially after warning that was given by accused No.1 Narayan Shashtri to Gadadharanandji about the creation of disturbance/ commotion. Recovery of huge cash amount from the residence of accused Nos. 1 & 3 is a supporting circumstance to the evidence led by the prosecution qua the motive. Report of handwriting expert who has examined the accounts and details of purchase of material etc. also shows involvement of accused No.2 Shrijicharan Swami and the opinion expressed qua point No.3 (exh.287 & 288) reveals that Shrijicharan Swami was also active in dealing with the administration as well as financial affairs of Vadtal main temple. It is true that no weightage should be given on the fact that at certain places, accused No.3 is addressed as “Waldheim Swami” or “Maldive Swami”- the owner of

two motor vehicles, one in his own name and one in the name of PW Laxmiprasad with whom accused No.3 was residing, this takes this Court to a conclusion that the argument of ld. Sr.Counsel Mr. Thakkar should not be accepted that accused No.3 has no concern or involvement in the financial matters of the temple especially when there is evidence as to the relations inter-se between accused Nos. 1 & 2 and accused No.3 which we have referred earlier. Adamance shown by Gadadharanandji even with Acharya Maharaj when he himself was present in the temple premises at odd hours during night time, appears to be the last attempt to prevent Gadadharanandji to propose for transfer of Chief Kothari of main Vadtal temple. It is true that the decision was not in the hands of deceased Gadadharanandji and he was authorized to simply propose the transfer and the name of the candidate vice transferee or the person who is made to retire. But this would not make the case of the prosecution week qua the motive unless the proposal is found totally useless or unfavourable or a person not worthy to the post and a Chairman normally is found to be accepted. It appears that three such proposals have been even approved by the Board of Trustees. It is likely that the proposal made by the Chairman qua the transfer

of Chief Kothari of Vadtal temple or his retirement might not have been accepted by the Board of Trustees, but such movement was not liked by so many including accused Nos. 1 & 2 otherwise how accused No.1 Narayan Shashtri and accused No.2 Shrijicharan swami would come to know that Acharya Maharaj is coming to Vadtal temple at odd hours in the midnight. The availability of both these persons very well near the Kothari Office or with Acharya Maharaj itself suggests that both the accused Nos. 1 & 2 had made their last attempt to bring pressure over and above the signature campaign against the Chairman so he may not propose or insist upon the transfer of Kothari of main Vadtal temple. Failure has resulted into the conspiracy to kill Gadadharanandji is the basic case of the prosecution. So, this is not the case where, as argued by Mr. Thakkar that the prosecution has simply suggested the motive vaguely. Chief Kothari Bhakti Kishoredasji is not the accused, itself would not make the evidence as to motive weak. Conclusion of the meeting after discussing three items qua agenda item No.2 also would not be sufficient to conclude that the proposed move of the deceased was either cancelled or dropped. Some other persons were having stronger motive or inimical feeling with

the deceased like Nautam Swami and Premswarup also, in view of this Court, would be irrelevant. There may be wish or desire to eliminate a person in the mind of more than one person, but unless it is otherwise proved or brought on record that other enemies probably may be there in killing Gadadharanandji, mere inimical feeling in the mind of some other Sadhu of Vadtal temple also would not make the evidence of motive weak or vague. The hostility of PW Dixitkumar- grossery provider to the temple, is also not capable of uprooting the fact that both the accused Nos. 1 & 2 were enjoying the creamy position and they had dealings in day to day purchasing and with financial affairs of the temple. On the contrary, through this witness, it has come on record that the purchase of the material was running in lakhs of rupees every year, if the documents seized from the residence of accused No.1 are considered.

The decision cited by ld. Sr.Counsel Mr. Thakkar in the case of **Bakshish Singh v/s State of Punjab, 1971(3) SCC 182** mainly confirms the ratio of earlier decision in relation to the case based on circumstantial evidence. On fact, the Supreme Court found that the case of prosecution is based on

six different aspects and one of which was motive (para-3 of the judgment) and the Apex Court in para-7 of the judgment has observed that it is unlikely that father and brothers would have murdered Mangalsingh for merely claiming his share in the family properties. The fact that deceased had left the house about 12 to 13 years before the occurance, could not have in ordinary course, induced them to deny him his share. There was no particular motive for the appellant to kill his brother. From the plain reading of the cited decision, the observations made by the Apex Court on the facts of the said case, would not help the accused in the present case. On the contrary, in a given case, absence of motive would not hamper the case of the prosecution, provided if it is found that the circumstances relied upon by the prosecution are proved satisfactorily and beyond reasonable doubt. According to us, the prosecution has led satisfactory evidence in the present case to establish the motive of the crime.

(xli) The evidence led by the prosecution is appreciated in the background of the charge of the offence of criminal conspiracy, then it is possible to accept that it is proved beyond doubt that the

murder of deceased Gadadharanandji has been committed and that act is an illegal act independentally punishable under section 302 of IPC. It is not necessary to reproduce the definition of “criminal conspiracy” given in section 120-B of IPC, but it is provided that it is immaterial whether illegal act is the ultimate object of the agreement or is nearly incidental to the object. The prosecution is supposed to prove that there was an agreement to commit a criminal wrong between the conspirator. Prior to amendment by incorporating section 120-A of IPC, “conspiracy” was merely a pieces of abetment as observed by the Apex Court in the case of **Yash Pal Mital v/s State of Punjab, AIR 1977 SC 2433.** It is said by the Apex Court in more than one decision that conspiracy is a phenomenon requiring engagement of at least two persons and essence is agreeing both of them to do an unlawful act or to do a lawful act by means either unlawful or illegal. The allegations against the accused falls in the category of the case where the accused persons have entered into an agreement and all of them had understood that Guru Gadadharanandji being a promoter of an idea to transfer/retire or to appoint Kotharis and Poojaris of temples of Swaminarayan Sect under Vadtal Gadi managed by

Shri Laxminarayan Dev at Vadtal & Temples Subordinate to its Trust and mainly for insisting to circulate the agenda to invite deliberations transfer of the Chief Kothari of Vadtal Main temple of the Trust. It is discussed at length about the date of election of Gadadharanandji as Chairman and other events that had taken place through which certain people concerned with the management of the trust were not in agreement with the idea mooted by deceased Gadadharanandji. They had expressed their unwillingness or displeasure directly or indirectly before him and attempted to persuade him and thereafter attempts were also made to pressurize him. As discussed earlier, there is satisfactory evidence to show that accused Nos. 1 & 2 were active and they had successful even in bringing Acharya Maharaj to Vadtal temple all the way from Nasik and from his residence which is there at some distance from temple premises in Vadtal town at odd hours i.e. at 12.00 midnight and these two persons were, as proved by the prosecution, active and concerned with the creamy position in the office of the Chief Kothari Bhakti Kishoredasji. The transfer of Bhakti Kishoredasji, as it appears from the evidence, would have reduced the status of Bhakti Kishoredasji, but there was apprehension of accused Nos. 1 & 2 to

suffer substantive loss and by greasing their hands from day to day dealings and from yearly financial turn over and the cash flow of the income of the temple. Considering the facts unearthed by the prosecuting agency mainly CBI, it is inferable that entire operation was not possible by one or two persons only because firstly Gadadharanandji was to be taken away from the area of his dominance. It was possible to blackmail him also by enticing him for sexual pleasure or any such other activities. He could not have been tempted by money-wealth because he was the first and authorized person to deal with the property and income of the temple. The arrangement of the pleasure trips and visit to various parts also would not be of much matter for him. He was already enjoying the power because he had just entered in to the position of the Chairman. The criminal wrongs committed qua the body of a person or persons mainly in a strange situation, family animosity at the instance of either or any other member of family or for any other reason or by any sexual weakness of a human being found involved and in most of such cases, suspects are found from the close vicinity. Of course, this Court can not take judicial notice or legally drawn any inference against any accused.

However, the investigating agency had initially cornered all the persons and had interrogated them thoroughly who were in the immediate next circle, as per the working set up of Vadtal temple and it is clear from the report submitted to the Court after investigation that keeping more persons than actually chargesheeted after custodial investigation, the investigating agency had adopted the theory of elimination. Adverse report of Lie Detection Tests were also there against some of the suspects including Nautam Swami etc. but ultimately the CBI was able to trace the thread of motive and then the modus adopted by the accused persons. So far as the accused Nos. 1 & 2 are concerned, they were sharing the motive and there is satisfactory evidence that they had a status and also reasons either to moot or to adopt the idea of elimination of Gadadharanandji. Their conduct to remain in the vicinity of relatives-cum-disciples and continue cordial relations with them even after disinclination even to see Acharya Maharaj and to take PW Kinjal and PW Jatin Bhagat at Nadiad during crucial and relevant hours, are relevant facts and can be used as an incriminating evidence qua the offence of criminal conspiracy, otherwise the crime could not have been kept under curtain for a very

long period. Recovery of valuables, money deposits, FDRs, cash amount etc. is the evidence capable of drawing inference that beneficiaries of the ill-gotten amount were ready to do anything. As mentioned earlier, the place of murder found out and proved by the investigating agency being Navli Gurukul Complex, is the place where Bhakti Kishoredasji and accused Nos. 1 & 2 were in a commanding position as trustees of that Trust. So, the place of murder adds to the strength of evidence collected qua the charge of conspiracy. The physical infirmity of Chief Kothari Bhakti Kishoredasji resulting into the administration and financial affairs is also a point which can not be ignored. Separation of accused Nos. 2 & 4 from Nadiad under the guise of their visit on a phone call of accused No.1 Narayan Shashtri and that too all of a sudden, as proved by the prosecution, clearly reveals the conspiracy. In the statement under section 313 of CrPC, both these accused persons have stated that they were to go to Zundal village. The evidence as to both PW Kinjal and PW Jatin Bhagat were not informed in advance prior to leaving of Vadtal temple for attending the function, is found acceptable otherwise, there was no reason for the accused to mention the name of Ahmedabad as

a place of their visit. The arrival of both the accused persons and mainly accused No.2 at the temple premises, after 7.00 or 7.30 p.m. or at any time prior to 9.00 P.M. shows their absence during the crucial period of commission of murder qua the time of death assessed by Dr. Gupta. Thick relations inter-se mentioned earlier, by itself is not a disqualification for any of the accused, but when accused No.3 was the person who took Guru Gadadharanandji away from Vadtal temple premises and if it is found that it is in furtherance of the intention, agreement or understanding arrived at to eliminate Gadadharanandji, it would not be possible to say that accused No.3 could not be said to be a person sharing motive and he had no reason to join accused Nos. 1 & 2 in any illegal activities or any unlawful act. The recovery of valuables including cash amount of Rs.60,000/ from the residence of accused No.3 during search and his ownership and enjoyment of two motor vehicles are the facts which are self-explanatory. The present status of Nautam swami would not nullify the effect of evidence collected by the prosecution qua conspiracy. The evidence brought on record as to cordial relations between Guru Gadadharanandji and accused persons (including accused No.3) on the contrary is helpful

to the prosecution.

(xlii) It is settled legal position that there can not be any direct evidence as to hatching of conspiracy and the criminal conspiracy can reasonably be inferred from the evidence collected during the course of investigation and led during the course of trial. The prosecution can never prove normally the actual place where the conspiracy is hatched. So, it may not be proved and the Court should not expect such a proof. So, it is always necessary for the Court to draw an inference from the direct or indirect evidence led by the prosecution as to the existence of a criminal conspiracy and then for the persons who can be branded as conspirator. As discussed earlier, there was no reason for accused Nos. 1 & 2 to be there at temple premises in the mid-night hours when Acharya Maharaj had been there to pursue Gadadharanandji to leave the idea to change/transfer of the Kothari of the main temple i.e. Vadtal temple. Undisputedly, the deceased was in controversy because of this issue. When there is sufficient evidence as collected earlier that deceased was last seen in the company of accused No.3 and when there is evidence led satisfactorily that the very accused i.e.

accused No.3 had led the investigating agency along with panchas at the place from where Bichchhuwada police had recovered a dead body, is sufficient evidence to link the accused No.3 with the charge of conspiracy with accused Nos. 1 & 2. The Court is not tempted with the arguments advanced by ld. Sr.Counsel Mr. Thakkar that there is neither legal nor convincing evidence under which the last seen theory could be applied because it rests on the evidence of a solitary witness i.e. PW Nazirmiya. As such, PW Nazirmiya, as discussed earlier, gets some corroboration from PW Chiman Parmar and taking investigating agency under a discovery of fact to the spot from where Bichchhuwada police had recovered a dead body, can be said to be a fact corroborating the version of PW Nazirmiya because PW Nazirmiya says that he had seen deceased leaving temple in a car of accused No.3 (actually registered in the name of Laxmiprasad). So, the conduct of accused No.3 and discovery of facts under section 27 panchanama, is found corroborative piece of evidence qua the facts stated by PW Nazirmiya and so it will not be possible for this Court to conclude that accused No.3 had reason to share the motive or it may an act of accused No.3 only without having any association or understanding with accused Nos. 1 &

2. The arguments advanced by Mr. Thakkar that accused No.3 had no reason to share the alleged motive, would cut the case of the defence side and that by itself is sufficient to infer the conspiracy in the nature of hidden agreement or understanding at least between accused Nos.1,2 & 3.

(xliii) The ld. PP appearing for CBI has practically conceded before the trial Court even in the written arguments submitted to the Court that there is no sufficient evidence which can be said to be cogent to link accused No.4 with the charge of conspiracy because the material witnesses involving the accused No.4 have turned hostile. In the opinion of this Court also, the accused No.4 was in the company of accused No.2 when they had gone to Nadiad and he was a person separating from PW Jatin Bhagat and PW Kinjal Joshi from Nadiad. This separation is considered to be one of the circumstance against the accused persons. But as some other cogent evidence which is available against accused No.2, is not there against accused No.4 i.e. evidence as to the motive, his presence in Vadtal temple when Acharya Maharaj visited the temple in the mid-night hours, his act of posing himself to be the Kothari of the temple in the function at the place of PW Durgesh Bhatt at Nadiad,

recovery of the documents as to investment of huge amount etc. At the most, it is inferable that accused No.4 may be present at Navli when Gadadharanandji was eliminated and murdered at Sant Niwas, Navli Gurukul Complex, but this inference itself would not be sufficient to prove that he was sharing an agreement. The other evidence found against accused No.4 can not be said to be satisfactory or cogent under which a legitimate inference can be drawn by the Court. The finding of the ld. Trial Judge holding accused No.4 as a person responsible as co-conspirator, is based on inadmissible evidence on record by way of proved contradictions. As discussed earlier, the evidence brought on record by way of proving contradictions can not be used as a substantive piece of evidence. So, considering the nature of the charge framed against accused and mainly accused No.4, this Court is of the view that the evidence qua accused No.4 is not adequate to link him with the crime as co-accused. Ld. Trial Judge ought to have accepted the written submissions made by ld. Counsel appearing for CBI. So far as accused No.5 is concerned, his presence is found practically from the beginning and the eventualities that had occurred on 03.05.1998. He was present with accused No.2 who had purchased

seven tins of cold-drinks from Sahajanand Cold-drinks. Thereafter, his presence was not noticed either by PW Jatin Bhagat, Kinjal Joshi or PW Nazirmiya and PW Chiman Parmar, nor he was the person who had accompanied accused No.2 who was there with accused No.5 when cold-drink tins were purchased. It was possible for accused No.2 to take Vijay Bhagat with him at Nadiad to attend the function. So, it is clear that two disciples – relatives were selected and Vijay Bhagat was spared. This very Vijay Bhagat is the accused as per IO Mr. Krishikar who led them to the actual place of commission of murder. The investigating agency was able to bring the circumstances on record which ultimately found important and relevant aspect qua the time of the death of the deceased assessed by PW Dr. Rajkumar Gupta. It is true that videography made by CBI at Navli Gurukul is a very weak and unuseful piece of evidence for prosecution. But, the fact disclosed by the accused in presence of panchas as to the place of murder and leading them to Room No.3 of Sant Niwas, Navli Gurukul Complex, when is found legal and admissible in evidence and there is no reason for the court to discard the evidence led by IO Mr. Krishikar in this regard, this Court is of the view that it is sufficient to link accused No.5

with the charge of conspiracy. He being the disciple of accused No.2, itself may not go against him, but when the involvement of accused No.2 is profound, the fact of disclosure which can be said to be a discovery of fact within the meaning of section 27 of the Evidence Act as to the place of murder, creates a significant situation. So, it is possible to infer from the evidence that but for Vijay Bhagat, CBI could not have located the actual place of murder.

(xliv) Now the question comes to shifting of the dead body to the place from where it was found i.e. in the sim of village Barothi. We have seen photographs and also considered the description of the dead body given by PW Dr. Rajkumar Gupta who has performed the post-mortem on the dead body of the deceased. When it is in evidence that accused No.2 Shrijicharan and accused No.1 Narayan Shashtri were there in the Vadtal temple at about 9.00 p.m. on 03.05.1998, rules out the possibility of their active participation in taking/shifting the dead body of deceased Gadadharanandji to the place where it was found and their involvement in shifting the same to the place where it was recovered. It is not possible for one Sadhu to reach in a motor car

through the area where practically every follower of Swaminarayan sect could notice and ask him as to why and how one person/sadhu is going in a motor car and that too by driving that vehicle because it is there in evidence that at least one in the company obviously should be there. There is no cogent evidence as to the presence of Vijay Bhagat till 04.05.1998 to 05.05.1998 in Vadtal Temple. Considering the health and body weight of the deceased, minimum two persons must have taken the body because to drag out the dead body from the vehicle and thereafter to throw the same into a ditch and setting ablaze and that too after pouring inflammable like petrol or diesel etc. on the body, was not an easy task for an individual. Vijay Bhagat, being a disciple of accused No.2, sharing the motive to the highest, whether would have been deputed with accused No.3, would be the question. If answer is given in affirmative, then whether such an answer can be said to be a conjecture and that too without any base, is another question. In the same way, if the answer is given in the negative, then the absence of availability of Vijay Bhagat till 04.05.1998 or 05.05.1998 in Vadtal temple site would also be a conjecture. When it comes to the charge of conspiracy, the conduct of accused No.5 of

his not being found in Vadtal temple site and when at his instance place of commission of the offence i.e. murder has been detected, it will not be possible for this Court to say that accused No.5 Vijay Bhagat was neither sharing the motive nor the activity and in turn the wrong committed.So, the prosecution has proved beyond doubt that illegal act of murder of deceased Gadadharanandji has been committed under an agreement or understanding arrived at between co-conspirators. After sharing the motive and a movement in the gate, if one remains inactive althroughout the commission of actual wrong or in an attempt to commit that wrong, also would make that person liable as co-conspirator and accused No.5 being the disciple of accused No.2, it is not possible for this Court to accept that even with his presence at Navli and a cold-drink shop immediately prior to the offending act, he could not have shared the motive and/or act with his Guru.

(xlv) So far as evidence as to the link in between is concerned, since this part of the evidence collected by prosecution has been seriously assailed by ld. Sr.Counsel Mr. Thakkar, there is sufficient evidence that accused Nos. 1 & 2 -being

the direct link in between qua being the persons working in the office of Chief Kothari and enjoying the creamy position, both were sharing the motive equally. In earlier paras of this judgment, link between accused Nos. 1 & 2 on one side and accused No.3 on the other side is discussed and is held to be found established and it is clear that major role in securing the goal of conspirators, was performed by accused No.3. Of course, there is some evidence as to the link between accused No.4 with other accused, but this evidence is found hazy and inadequate. Accused No.5- a close associate of disciple of accused No.2 and person aware about the place of murder, is found to be co-conspirator and it is legitimately inferable that he was a party in shifting the body at the place from where it was found with accused No.3, through his conduct and his link and association with accused No.2. It is true that a person having relations with culprit is not a circumstance inconsistent with the innocence, but there are circumstances sufficient in the nature to link accused No.5 with the crime of conspiracy.

(xlvi) So far as link between the circumstances collected by the investigating agency and proved by the prosecution are concerned, these links are

visible and are found in two parts viz (i) some are clear and visible and (ii) some rests on legitimate and inferable facts.

(a) The first circumstance brought on record indirectly by the prosecution is that all the accused persons were forming inner group having direct or effective say in the financial and administrative matters of Temple Board Trust in general and Vadtal main temple in particular. Of course, as observed earlier, the thickness of relations found qua accused No.4 Ghanshyam Prakashdasji by itself is not inconsistent with his innocence.

(b) The second circumstances brought on record by the prosecution satisfactorily is the motive for commission of the crime.

(c) The next circumstance that has been found proved is the deceased last seen in the company of accused No.3 and that theory is found applicable on the facts of the present case.

(d) The next circumstance is that it is proved satisfactorily and beyond doubt that accused No.3 had disclosed the fact for the first time in a

statement made under section 27 of the Evidence Act, irrespective of the inimical feelings that Panch Gautam was having against the accused persons, because in the evidence of IO Mr. Krishikar vis-a-vis the evidence of PW Shankar Damor and SHO Mr. Bhati, this part of evidence is found legally proved and it also transpires confidence. It is relevant to note that there was no direct animosity between either Sarpanch or Panch Gautam with accused No.3 in particular or with accused person in general of that great magnitude. The suggestion made qua inimical feelings of panch Gautam and Sarpanch of village is for the event that had occurred comparatively much prior to the event of missing Guru. The context is found changed substantially from the moment it was revealed that Gadadharanandji had not gone some-where, but he is actually missing.

(e) The next circumstance is the success of the investigating agency in finding out the actual place of murder i.e. Sant Niwas situated in Navli Gurukul Complex and the fact that village is not situated at a far distance from main Vadtal temple.

(f) The next circumstance is the command over the administration over Navli Gurukul Complex by Chief

Kothari Bhakti Kishoredasji and accused No.1 & 2 as discussed earlier, because this fact has come on record and the same is practically not seriously assailed. Of course, the certified true copies obtained from the Charity Commissioner were produced before the Court with the list of documents tendered by Spl.PP, but they have not been exhibited for want of tendering these documents in evidence. However, in oral evidence, this aspect has come on record and we have discussed this aspect in detail in earlier part of this judgment.

(g) The distance between Vadtal temple and Navli Gurukul vis-a-vis the distance between these two places and the sim of village Barothi- a village falling under Bichchhuwada Police Station is also an important circumstance, because it is possible to reach to that spot in a couple of hours after sunset and to return back to Vadtal temple during day light on 04.05.1998 by the persons who had gone to off-load the dead body and setting it on fire by pouring inflammable like petrol or diesel etc.

(h) The next circumstance is that the time of death assessed by PW Dr. Rajkumar Gupta substantially tallies with the time of commission of murder and

also with the time of leaving of Guru with accused No.3 and return of some of the accused persons who were also out of temple premises including accused No.2 before 9.00 p.m. on 03.05.1998.

(i) The purchase of cold-drink tins from Sahajanand Cold-drinks by accused Nos. 2 & 5 and that too seven tins vis-a-vis the probable persons who were expected there in Navli Gurukul in the eve of 03.05.1998. Of course, the evidence is not clear or cogent, but as there is no evidence as to the presence of accused No.5 in Vadtal temple and this fact has not satisfactorily come on record even during the course of cross-examination of the witnesses and in couple of minutes or say within half an hour, the actual buyer of tins had left Vadtal to attend the function at Nadiad. So, this circumstance proved by the prosecution is based on a direct or indirect fact situation that has come on record, but it is not possible to ignore this aspect/circumstance.

(j) The discovery of the fact as to the actual place of commission of offence i.e. murder by accused No.5 under a panchanama drawn under section

27 of the Evidence Act. Even for the sake of arguments it is accepted that the name of the village is found out by the investigating agency or it becomes a matter of loose information of investigating agency, even than the actual place is Swaminarayan Gurukul Complex, Navli village and that too in room No.3 of Sant Niwas, is the fact which was within the exclusive knowledge of accused persons including accused No.5. So, inadmissible or weak part of evidence collected while drawing panchanama under section 27 of the Evidence Act even if it is ignored, it is proved that till the time accused No.5 took the investigating agency there at room No.3 of Sant Niwas, Navli Gurukul Complex, none from prosecuting agency was aware about the actual place of offence. The discovery of the place of murder has also impliedly proved that deceased was not carried in a living condition and it also rules out the possibility of commission of murder at or nearby the spot where the dead body of the deceased was found because the time of the death assessed by Dr. Gupta confirms the circumstances collected by the investigating agency and proved by the prosecution.

(k) The circumstance and the evidence brought on

record by the prosecution successfully establishes that the dead body found at the instance of PW Shankar Damor and villagers of village Barothi and in turn by Bichchhuwada police was of missing Guru Gadadharanandji.

(l) It is also proved that the death of the deceased was a homicidal death.

(m) The evidence as to the physical infirmities which Chief Kothari Bhakti Kishoredasji was having and status of accused Nos. 1 & 2 in the office of Chief Kothari and their role in the day to day administration and in financial matters of the temple proved by the prosecution, is also a circumstance which is relevant which goes against the accused beyond the point of motive when huge cash amount was recovered from the residential premises of accused No.1 and documents as to investment in bonds, KVPs etc. of large amount were also found from the residence of accused No.2 as well as recovery of cash amount of Rs.60,000/ from the residence of accused No.3 Madhavprasad. The conduct of accused Nos. 1 & 2 and one Ghyanprakashdasji to claim the muddamal recovered under sec.451 of CrPC without pointing out any fact

as to how and under what circumstances such a huge cash amount and investments in bonds made in the name of the accused or in the name of a Sadhu or Sanyasi who were close to these accused persons, may be a Guru, a disciple or a Gurubhai, has been made, when all these persons including the accused were Sadhus and Sanyasis or disciples who have renounced the world. This is also a circumstance against the accused persons. Accused Nos. 1 & 2 have admitted their active participation in the management of the office of the Chief Kothari and the opinion of the handwriting expert also is relevant to prove this circumstance.

(n) The accused Nos. 1 & 2 were kin to see that there is no transfer or retirement or new appointment of a Chief Kothari in Vadtal temple because that would result into their implied removal from the day to day management and financial affairs of the temple running in lacs of rupees and to achieve this goal, they had brought pressure of the highest dignitary of the Swaminarayan Sect of Vadtal Gadi i.e. Acharya Maharaj and he was even brought in temple premises at mid-night and deceased Guru Gadadharanandji had not paid any heed to the visit of Acharya Maharaj or his persuasion and,

therefore, Gadadharanandji was also warned by accused No.1 of dire consequences.

(o) The wheel-marks that were found by Bichchhuwada police at the time of drawing panchanama on 04.05.1998 was of a small vehicle and on that day nobody was knowing that blue colour maruti van of de-facto ownership of accused No.3 Madhavprasad has been used in the commission of the said offence.

(p) The conduct of accused No.3 and the persons close to him were successful in impressing upon the residents of Vadtal temple complex that maruti van of accused No.3 had met with an accident and was burnt because of fire. Of course, this fact has come on record as if the prosecution witnesses had “heard about such an event” otherwise this part of evidence could have been ignored being a hear-say evidence, but when it is found that it was the say of accused No.3 himself before the Insurance Company that the vehicle driven by him had caught fire because of leakage of LPG gas, strengthens the evidence found on record i.e. an attempt was made to create an impression that the car is totally burnt in an accidental fire otherwise including PW Jatin Bhagat and PW Kinjal Joshi, other prosecution witnesses

also could have expressed their doubt either before CID Crimes or before any other police before the investigation was transferred to CBI at the instance of the order passed by this Court.

(q) The falsity of the claim vis-a-vis the statement made by accused No.3 Madhavprasad before PW Arvindbhai- a Surveyor – is the evidence contrary to the innocence and also a circumstance available on record on account of the conduct of the accused and we have discussed this part of conduct of the accused in detail and this evidence is of cogent nature.

(r) The traveling of accused No.3 alone as claimed by this accused before the Insurance Company is also found false and surreptitious because it is in evidence that no Sadhu or Sanyasi, Tyagi or Brahmchari of Swaminarayan Sect is permitted to leave the premises of the temple, Hari Mandir, Gurukul etc. alone unless he is in the company of one another Sadhu, Sanyasi, Brahmchari, disciple or Hari Bhagat. When accused No.3 himself had admitted that he was alone when his Maruti van met with an accident and caught fire as stated by him before the insurance company, it should be held to be a strong

circumstance against the accused when it is revealed that the car had not met with an accident on account of catching fire because of gas leakage resulting into its dashing with a tree and found lying at the time of survey carried out by the surveyor of the insurance company.

(s) The date and time of death of missing Guru Gadadharanandji, the date and time of giving written application to Chaklashi Police Station about missing of Guru Gadadharanandji and date and time when car of accused No.3 was allegedly caught fire i.e. in an early hours of 06.05.1998, is also a circumstance when it is claimed that accused No.3 was alone at the relevant point of time.

(t) It is proved beyond doubt despite all the attempts made by the defence side that blue colour maruti van was merely registered in the name of PW Laxmiprasad, but the de-facto owner and actual user of the said maruti van was accused No.4 himself.

(u) The evidence brought on record whereby it is proved that the car was set on fire using inflammables and it has never met with an accident as alleged, in reference to other direct as well as indirect evidence led on this point by the

prosecution, is also an important circumstance.

(v) The use of mobile phone of accused No.2 to establish the contacts with PW Rakshit Shah, a trader of Anand is found strange especially when PW Rakshit Shah has denied any type of acquaintance with accused No.2 Shrijicharan. It is true that such a denial by PW Rakshit Shah would not make the accused No.2 liable, but an attempt made by the prosecution is that a long acquaintance between accused No.2 and PW Rakshit Shah was used to entice deceased Gadadharanandji. If the acquaintance was innocent or otherwise because of some religious feelings, than such a false denial would not have come on record made by PW Rakshit Shah and on the question asked as to the evidence led with regard to relevant document i.e. print out as to the use of cellular phone by accused No.2, the accused No.2 could have explained as to how the documents produced are relevant. These documents disprove the claim made by PW Rakshit Shah about the fact that he has no acquaintance with accused No.2 and even he does not know accused No.2 at all and the close reading of the bill also establishes that there was frequent use of this mobile phone set after departure of accused No.2 from Nadiad and/or

round about that period.

(w) The evidence of PW Kinjal Joshi and PW Jatin Bhagat that accused Nos. 2 & 4 separated themselves from Nadiad saying that they had received a telephonic message from accused No.1 and, therefore, they will have to go to Ahmedabad/Zundal. The disclosure of the name of two different places shows confused state of mind as to what should be told to PW Jatin Bhagat and PW Kinjal. Their time of separation and the fact that their presence was there in the temple some time prior to 9.00 p.m. on 03.05.1998, is found relevant and independent circumstance in absence of satisfactory explanation on the point.

(xlvii) The law on the point of circumstantial evidence has been pointed out to us by by the ld. Sr.Counsel Mr. Thakkar for the accused as well as by ld. Counsel Mr. Ravani for CBI and the hammer is on the point that the prosecution is not only under an obligation to prove each circumstance by leading satisfactory cogent evidence, but is also supposed to show the establishment of the chain of each circumstances having link in between. The circumstances of the evidence collected qua the fact situation before hatching of conspiracy obviously

therefore is not required to be established. So, it is not necessary to establish the link between the crime and the motive because the motive motivates to hatch conspiracy. It may be a conspiracy to concur a particular goal by conspirators who may have different motive in their minds. As mentioned earlier, motive is also hidden in the mind of the accused, but in the present case, the prosecution is consistent as to the motive of crime. So, keeping this motive in the background, the circumstances shall have to be seen and it was necessary to visualize establishment of link in between these circumstances. This court is of the opinion that the failure in Lie Detection Test by some and fact of successful clearance of Lie Detection Test by some of the accused including some accused, may not help the accused because it is the experience of the investigating agency as well as the Court that a person involved in an offence in a planned manner or who is well-informed or having knowledge of all relevant details of actual commission of offence, can successfully clear the Lie Detection Test. Brain Fingerprinting Test is materially different than the Lie Detection Test and such a test has not been carried out in the present case. So, this situation is not found contrary to the attempts made by the

prosecution to establish the link between the evidence collected by prosecution mainly CBI because Lie Detection Test was carried out much prior to the entry of CBI into investigation. There is no legal and cogent evidence on the fact of enticement made to deceased Gadadharanandji by offering him inducement-sex, but the fact remains that Guru Gadadharanandji though he was under controversy, had rightly agreed to accompany accused No.3 Madhavprasad even during his rest hours. The act of Guru Gadadharanandji pushing his one of the disciples in the torching hit with rickshaw-wala PW Ismail Vora, is nothing but an act of deceased Gadadharanandji of facilitating him to leave the temple premises with accused No.3 Madhavprasad and that too without disclosing the cause for accompanying accused No.3 Madhavprasad. The very Guru visited village Khanjali on 03.05.1998 during day time i.e. fore-noon with his all pari-fernials and that too in TATA Sumo vehicle driven by the driver of the temple and, therefore, the conduct of deceased Gadadharanandji leaving the temple premises alone in the company of accused No.3 Madhavprasad, is a strange conduct. So, some inducement or threat would have worked and when it is possible to rule out the element of presence of threat, than only the

scope of existence of enticement remains. This part is discussed earlier. So, it is not the case of “nil” evidence as argued on the point of enticement. This is not the case of non-examination of witnesses on the issue of enticement/inducement offered to Guru Gadadharanandji. The fact situation that important witnesses have turned hostile and/or non-examination of material witnesses on a particular point, would be materially different when it comes to non-availability of the cogent and convincing evidence on that particular point. Making no attempt to prove a particular point is one situation by tendering witness in the Court for examination and failure in doing i.e examination of such witness is another situation and in criminal courts, both these situations are appreciated in a different way and yardsticks used while appreciating such evidence obviously would be different. In the same way, this is a case where the prosecution his tried to prove certain important aspects and has examined witnesses like PW 18 Fatesingh (exh.157) who has proved the muddamal walking stick of deceased Gadadharanandji recovered from the residence of missing Guru Gadadharanandji. This witness has also stated that he is a regular visitor and a devotee of Vadtal temple and follower of

Swaminarayan Sect and he was knowing Gadadharanandji since about 15 years and was having good relations with him. He was also visiting residence of Gadadharanandji for “satsang” (religious and spiritual conversation). He has proved that Gadadharanandji was putting on gold chain made of “tulsi beads” and he was also putting on a gold ring, but the prosecution has remained unsuccessful in finding out that very gold chain or gold ring and the nature of evidence collected by examining one another witness in this regard i.e. goldsmith PW -10 Jignesh Kanubhai Soni, is not found convincing. So, only because the evidence available in the present case has different sheds, it would not be possible for the Court to say that this is a case of no evidence or a case where important evidence to establish the chain of circumstances, is missing.

(xlviii) In the case of **Sarwan Singh Rattan Singh v/s State of Punjab, AIR 1957 SC 637,** it is held that in a criminal case, mere suspicion, however strong, can not take place of proof. In paras 9 & 12 of the said decision, it is observed that :-

> “9. If the evidence of the approver is discarded as being unreliable the case against Harbans Singh must inevitably fail. No doubt

there are some circumstances against him on which the prosecution relies. The evidence of Rakha (P. W. 8) would show that Harbans Singh and the other accused persons were concerned with the purchase of a pistol from Rakha. Incidentally this pistol has not been used in the commission of the offence at all and that, in the circumstances, it is difficult to explain.

However, the purchase of a pistol from Rakha may merely raise a suspicion against Harbans Singh but suspicious, however, strong, cannot take the place of proof. Harbans Singh had injuries on his person and the conduct of Harbans Singh soon after the commission of the offence was very suspicious. That again may raise a suspicion against Harbans Singh but without the basis of the approver's evidence these suspicious circumstances can play no effective part in a criminal trial.

The discovery of clothes alleged to have been made at the place of Gurdev Kaur cannot be pressed into service against Harbans Singh because Gurdev Kaur herself has not been examined and the importance of the recovery of

a kirpan and a red scabbard from the spot cannot obviously be exaggerated. In our opinion, there is no doubt whatever that, if the approver's evidence is rejected as unreliable, the other evidence on which the prosecution relied against Harbans Singh cannot possibly sustain his conviction of the offence of murder.

We must, therefore, hold that the finding of the learned Judges of the High Court that the offence of murder has been proved against Harbans Singh is vitiated by a serious infirmity to which we have just referred and must be reversed.

If the learned Judges have failed to address themselves to the initial question of law before dealing with the merits of the approver and if, in dealing with his evidence, they have failed to take into account the glaring and obvious inconsistencies in the account given by the approver, it is open to the appellant to challenge the validity of their conclusion. In the result, the appeal preferred by Harbans Singh must be allowed, the order of conviction and sentence passed against him must be set aside and he must be acquitted

and discharged.

xxxx xxxx xxxx xxxx xxx

12. That leaves the other circumstances which have been proved against Sarwan Singh to be considered. There were injuries on his person. They are thus described by the doctor: -

"1. A superficial incised wound with a scab, 3/8" x 1/2" on the left side of the face, just above the left mustache.

2. An abrasion with a scab 1/2" x 1/4" on the other surface of the middle digit of the left ring finger.

3. An abrasion with a scab 1/8" x 1/8" on the outer surface of the middle digit of the left little finger.

4. An abrasion with a scab 1/4" x 1/4" on the outer surface of the terminal inter-digital joint of the left little finger.

All the injuries were simple and of about two days duration. Injury No.1 was caused by sharp-edged weapon and the rest by some blunt weapon."

In his cross-examination Dr. Singh admitted that injury No.1 could have been caused by razor blade as suggested by the counsel for Sarwan Singh and injuries Nos. 2 to 4 could have been caused by rubbing against some hard substance. In other words, on medical evidence, it is difficult to reject the

explanation of the accused as unreasonable or palpably untrue. Then we have the evidence of blood-stains on the shirt and chadar worn by Sarwan Singh. If the explanation given by Sarwan Singh about his injuries is not unreasonable then the presence of blood-stains on his dress cannot be seriously pressed against him.

The evidence of Rakha about the negotiations and purchase of a pistol from him and about the part of Sarwan Singh in that transaction no doubt may suggest that Sarwan Singh was associated with the criminals but that is very far from proving the charge of murder against him. Incidentally, as we have already observed, if the pistol was purchased it is difficult to understand why it was not used. Then we have the evidence of the shoes which were found on the spot.

The evidence of the shoemaker Santa Singh suggests that he had identified the pair of shoes as belonging to Sarwan Singh that very night. According to him, he has been manufacturing shoes like this pair though not on a large scale. Unfortunately, in his examination under S.342 of the Code, no

question had been put to Sarwan Singh about these shoes. It is not unlikely that Sarwan Singh may have offered to demonstrate that the shoes did not fit in with his feet.

In any event, failure to give him an opportunity to explain the circumstances by putting an appropriate question to him under S. 342 justifies his argument that this circumstance should not be used against him. Besides, like the evidence given by Rakha, the identity of the shoes would also be a very minor circumstance in relation to the charge of murder for which Sarwan Singh is being tried.

The result is that, if the approver's evidence is discarded as unworthy of credit and his own retracted confession is excluded from consideration as not being voluntary of true whatever circumstantial evidence remains is obviously insufficient to bring home to Sarwan Singh the charge framed against him. If that be the true position, we must hold that the learned Judges of the High Court were in error in convicting Sarwan Singh of the offence of murder.

It is no doubt a matter of regret that a foul cold-blooded and cruel murder like the

present should go unpunished. It may be as Mr. Gopal Singh strenuously urged before us that there is an element of truth in the prosecution story against both the appellants. Mr. Gopal Singh contended that, considered as a whole the prosecution story may be true; but between 'may be true' and 'must be true' there is inevitably a long distance to travel and the whole of this distance must be covered by legal, reliable and unimpeachable evidence.

We have carefully considered all the arguments which Mr. Gopal Singh urged before us; but we do not think it would be possible to regard the approver as a reliable witness or to hold that the confession of Sarwan Singh is voluntary or true. In the result, the appeal preferred by Sarwan Singh must be allowed, the order of conviction and sentence passed against him must be set aside and he must be acquitted and discharged."

This decision cited by Mr. Thakkar propounds the well accepted ratio, but the facts in the cited decision are materially different. The trial Court has held the three accused guilty of the charges levelled against them, but on appeal, the order of

conviction and sentence imposed against accused Harbanssingh and Sarwansingh was confirmed by the High Court whereas the order of conviction and sentence against one accused Gurudayal Singh was set aside and he was ordered to be acquitted. In the cited decision, the Apex Court has dealt with the evidence led during the course of the trial in the context of the basic facts placed.

(xlix) One another decision cited by Mr. Thakkar in the case of **State of Madhya Pradesh v/s Paltan Mallah & Ors. (2005)3 SCC 169.** In this case, a murder of a powerful and very popular trade union leader was committed. The ratio of this decision would not help the accused persons. On the contrary, the Apex Court reversed the order of acquittal of the respondent accused Paltan Mallah and the acquittal of some of the accused has not been disturbed by the Apex Court by confirming the acquittal saying that “if two views are possible and the High Court has chosen one view which is just and reasonable, then the Supreme court would not interfere with the judgment of the High Court”. We have carefully gone through relevant pars 8 to 18 of the judgment.

(l) In case of **K.Purshothaman v/s State of Kerala, (2005)12 SCC 631,** the Apex Court was dealing with the case where the appellant accused was dealing with a case where the appellant accused was found involved in the offence punishable under sections 120-A, 120-B, 403 and 477-A of IPC. On close reading of the ratio propounded by the Apex Court in the above decision and particularly in paras 10 to 15, 18 & 19, this Court is of the opinion that the same, probably, would help accused No.4 Ghanshyam Prakashdasji Swami because the case of the prosecution against the appellant accused was that he had accompanied original accused No.3 who was actually entrusted the gold of "DEVASWOM BOARD". The gist of the finding of the decision is given by the Apex Court in paras 18 & 19 of the said decision. It would be relevant to reproduce the same:-

> "18. From the findings arrived at by the High Court that it was A-3 who was entrusted with the gold by the Devaswom Board, and who was looking after the affairs of making the ornament golaka, simply because the accused-appellant had accompanied him to Coimbatore, it can not be inferred that

there was an agreement entered into between them to misappropriate the gold. To constitute a conspiracy, agreement between two or more persons for doing an illegal act, or an act by illegal means, is a sine qua non. Although the agreement among the conspirators can be inferred by necessary implication, the inference can only be drawn on the parameters in the manner of proved facts, in the nature of circumstantial evidence. Whatever be the incriminating circumstance, it must be clearly established by reliable evidence and they must form the full chain whereby a conclusion about the guilt of the accused can be safely drawn. Even if we hold that at some point of time, the appellant-accused had some knowledge or suspicion about A-3 indulging in fraudulent misappropriation of gold, entrusted to A-3, in the absence of some positive evidence indicating agreement to that effect, conspiracy could not be inferred. On the findings itself arrived at by the High Court, we cannot hold that the appellant-

accused was the conspirator to misappropriate the gold, with A-3."

19. On the scrutiny of the entire facts led by the prosecution, the charge of conspiracy cannot stand as there is no link to show that the conspirators agreed to misappropriate the gold while the gold ornament was being prepared."

(li) In case of **State of Haryana v/s Jagbir Singh and Another, (2003)11 SCC 261,** the Apex Court was dealing with the case squarely based on the circumstantial evidence. The inference of guilt can be justified only when all incriminating facts and circumstances are bound to be incompeteable with the innocence of the accused or guilt of any other person, is the ratio of the above cited decision. Considering the observations and discussion made by the Apex Court in paras 8 to 10 of the said decision, the obligation on the Court is that before holding the accused guilty in a case based on circumstantial evidence, the Court should take each circumstance and should be tested by the

touch-stone of law relating to the circumstantial evidence laid down by the Apex Court in the case of **Hanumant Govind Nargundkar and another v/s State of Madhya Pradesh, AIR 1952 SC 343 (1953 Cr.LJ 129).** In the present case, the finding of the guilt is recorded by the ld. Trial Judge considering the cumulative effect of the circumstances proved. So, while analyzing the factual aspect of the present case, it is possible to state that for a crime to be proved, it is not necessary that the crime must be seen or must have been committed and in all circumstances, be proved by direct occular evidence or each circumstance should be as bright as the direct occular evidence. It is now settled legal position that the Court is supposed to evaluate the circumstances available and proved legally during the course of trial because the offence can be proved by bringing various circumstances on record. It may be only one or more in number, but if they are more in number, a visible chain between these circumstances should exist. The existence of link between the circumstances should look

apparent/visible. The principal fact can be held to be established qua the point in issue and that too by consistency in evidence. If the same is put slight differently, the circumstantial evidence is not the direct to the point in issue, but consistency in evidence qua various other facts which are so closely associated with the fact in issue, which if taken together, form a chain or circumstance from which the existence of a principal fact **can legally be inferred or presumed. (emphasis supplied for the purpose of present judgment).**We can equate a circumstance with a sparkling star analogically. There may be collection of different stars in the sky. A star may give light to the other to the extent that one can say or claim that two stars together are sparkling (twinkling). It is like a constellation. So, the stars in the background of the dark sky may technically not be said to be linked or attached with each other, even then their group may constitute constellation and on concentration or by experience or having a vision, one can easily point out that a particular group of stars is forming a

constellation and forming a particular shape and all these stars firstly and apparently are starring /twinkling in the sky separately and differently, but even then they do form a picture (constellation) popularly known as “Nakshatra”. Merely because some persons like the present accused submit that there is no link in between the circumstances brought on record by the prosecution, but the prosecution simultaneously can equally submit that the Court should try to visualize the link between the circumstance and on attempts, the ld. Trial Judge found that the link between the circumstances exists. On detailed discussion that has been made by this Court in foregoing paragraphs of this judgment qua the facts and points placed before this Court by ld. Counsel Mr. Thakkar as well as by ld. Counsel Mr. Ravani for the CBI and ld. APP Mr. KT Dave, we are inclined to say that the link between the sparkling facts brought on record by the prosecution does form a constellation and the arguments advanced by Mr. Thakkar are not accepted that the prosecution has failed to

prove the link between the circumstances that have come on record during the course of trial because some of the circumstances have either not been proved or have been held proved on the strength of inadmissible evidence. We have ignored the weak part of the circumstances or say the circumstances that have been held proved on inadmissible evidence or inadequate evidence, but the constellation of these circumstances do not dispute the strong link between the circumstances which are capable to realize the existence of constellation or the facts proved. Here, it would be relevant to refer to the observations made by the Apex Court while dealing with the case placed on circumstantial evidence in the case of **Gura Singh v/s State of Rajasthan, 2001 Cri.LJ 487,** Which have been reproduced by this Court in the earlier para of this judgment.

(lii) In the background of the ratio of the decision in the case of **State of Rajasthan v/s Gopal, (1998)8 SCC 449,** and also in the case of **Bakshish Singh v/s State of Punjab, 1971(3) SCC**

182, even if accepted as good law till date, the same would not go against the prosecution, because in a case based on circumstantial evidence, the circumstances which are the conclusions of the guilt to be drawn, should be fully proved , is the first main condition and such circumstances must be conclusive in nature by itself, is the second condition. Moreover, all the circumstances should be complete meaning thereby each circumstance must be complete and such complete circumstance brought on record should be consistent and should constitute a chain, is the third important aspect and the fourth important aspect is that there should be no gap left in the chain of circumstances. It is obligatory on the part of the prosecution that these circumstances must be consistent only with the hypothesis of guilt of the accused and totally inconsistent with his innocence. As observed by the Apex Court, if the motive is proved satisfactorily in a case based on a circumstantial evidence, then such a proof of motive would supply a chain of link. **(State of Gujarat v/s Anirudhsingh 1997 Cri.LJ 3397).**

Circumstances in the nature of various crystals brought on record, may be having different size, shape and brightness, can get intrinsic thread to form a chain of constellation. So, the substantial success in bringing on record the motive for doing a criminal wrong by leading evidence, oral as well as documentary, makes the prosecution case powerful in saying that the circumstances collected and proved individually and/or collectively, should be viewed with intrinsic thread of motive pleaded and proved because as observed earlier, the motive for doing a criminal wrong generally is a difficult area for the prosecution to prove and one can not normally see in the mind of the others. As observed by the Apex Court in the case of **Nathuni Yadav v/s State of Bihar, (1978)9 SCC 238,** the motive is an emotion which impulses a man to do a particular act. Such impelling cause needlessly and necessarily be proportionately grave to do a crime. Many murders have been committed without any known or prominent motive and, therefore, there is a scope that impelling factor leading to the accused to a grave offence

would remain undiscoverable. This Court has appreciated number of circumstances as discussed in foregoing paras of this judgment and also has tested the strength and clarity of each crystal or circumstance emerging from record ignoring the comments made that are out of the ambit of the settled law, by the ld. Trial Judge. Large number of authorities have been placed before this Court wherein the Apex Court has decided the cases based on different facts situation wherein the prosecution cases are resting on circumstantial evidence, but it is not necessary to comment on each decision wen the observations made in the cited decisions have been kept in mind while evaluating the evidence as well as rival submissions.

(liii) Certain infirmities have been pointed out by ld. Sr.Counsel Mr. PM Thakkar for the accused while submitting that the case of the prosecution should not be held to be proved beyond doubt against any of the accused. According to Mr. Thakkar, the first and basic infirmity in the case of the prosecution is

the absence of fairness on the part of investigating agency and this Court has accepted that some overdoing has been made by the IO Mr. Krishikar while getting the copy of the treatment papers from Dentist Dr. Upen Diwanji, only with a view to see that number of teeth in the treatment papers tallies with the number of teeth noted by PW Dr. Rajkumar Gupta, while performing autopsy. But, this overdoing does not create a situation whereby a dead body of a unknown person can be identified or posed to be a dead body of a missing Guru Gadadharanandji. This Court has made detailed discussion in foregoing paras of this judgment and in our view, the same can not be said to be an infirmity. It is true that failure to recover the original of exh.98 by CBI would make exh.95 doubtful, but it would not nullify the effect and impact of the document exh.98 itself which is brought on record during the course of cross-examination. Exh.98 simply disproves the genuineness of exh.95, but it also proves that the deceased was having a golden cap and that was even seen by this Court in the photographs

undisputedly proved by the prosecution.

The second infirmity is about the selection of panchas while carrying out crucial and important panchanama drawn under section 27 of the Evidence Act, as submitted by Mr. Thakkar. It is true that while selecting panchas, IO Mr. Krishikar ought to have placed certain questions to panch witnesses and it was not impossible for him to get a person having no ill-feelings even in the past against any of the accused persons. But that by itself, would not make the panchanama doubtful or unlawful because one of such crucial panchanamas i.e. first part of the panchanama drawn on discovery of fact by accused No.1 at village Barothi gets corroboration qua its genuineness from other sources and circumstances and for that we have discussed in detail in our earlier paragraphs of this judgment.

The third infirmity qua the fairness of investigation has been pointed out by Mr. Thakkar by drawing attention of this Court on

different statements of one witness signed by IO whereby the prosecution has attempted to replace the name of accused in the statement of PW Ramanbhai Dahyabhai Parmar. Detailed cross-examination has been made of IO Mr. Krishikar by the ld. Counsel appearing for the accused No.1 and on careful reading of the documents shown to IO Mr. Krishikar and answers given by this very witness in para-22 of his deposition, this Court accepts that the ld. Trial Judge has not discussed the submissions made on the strength of the evidence available in reference to para-22 of the deposition of IO Mr. Krishikar in correct perspective. It appears that this part of evidence has been casually dealt with. It was possible for the ld. Trial Judge to criticize the IO who has recorded the statements of PW Ramanbhai Parmar on 13.12.1998. In one of the statements i.e. in mark-A, word “swayam” is missing and there is a reference of accused No.2 Shrijicharan Swami as the person sitting besides Gadadharanandji when Gadadharanandji was being taken in the car by accused No.3 Madhavprasad. In the statement mark-B of the

very witness of that very date, the additional word “swayam” is found and the person sitting besides Gadadharanandji is shown to be Ghanshyam Bhandari i.e. accused No.4. The explanation given by the officer is not found convincing. When it is said by this very witness that he has not signed any statement without reading it, if written by his assistant, than such a mistake would not have cropped up. But in the opinion of this Court, this would make the case of the prosecution weak qua accused No.4 Ghanshyam Bhandari. This witness Raman Parmar has not supported the case of the prosecution otherwise the prosecution would have argued with more strength that there is an evidence to link accused No.4 Ghanshyam Bhandari as he was also seen in the company of deceased along with accused No.3 Madhavprasad. We will comment on the situation under which the second statement of the very witness signed by IO Mr. Krishikar himself had reached to the accused person so that the same can be shown to this witness during cross-examination, but at least it is possible to infer that this infirmity is an

important infirmity, but it does not kill or cut the case of the prosecution totally. This would make the case doubtful qua accused No.4 Ghanshyam Bhandari and there is no evidence which can be said to be satisfactory or legal that accused No.2 Shrijicharan Swami had also left with deceased Gadadharanandji when he was taken out of temple premises by accused No.3 Madhavprasad. On the contrary, it is in the evidence of PW Kinjal Joshi as well as PW Jatin Bhagat that accused No.2 Shrijicharan Swami was in their company when they visited Nadiad.

The next infirmity pointed out by ld. Sr.Counsel Mr. Thakkar is as to the evidence led qua the keys of the lock that was being applied to the residential premises of deceased Gadadharanandji. The answers given by IO Mr. Krishikar in a casual manner and also while crystallizing the marks over the key at the time of drawing seizure panchanama, needs some discussion. But while dealing with this part of evidence, this Court has ruled out the possibility of tampering with the keys or the

scope of exchange of keys in between. By ascertaining this fact by scrutinizing the muddamal keys by ourselves, it is found out that some bona fide mistake has been committed, otherwise, IO Mr. Krishikar could not have said in the cross-examination on behalf of accused No.3 that he had recovered two keys having mark “tri circle, China” on one side and on the other side, marks of “three circles”. While answering a pointed question, he has said that each key was having such marks. Undisputedly, only one key was recovered by Bichchhuwada police and it was lying in the sealed condition and was seized and recovered in a sealed condition from Bichchhuwada police. When other oral as well as documentary evidence clearly reveals that the answers given by IO Mr. Krishikar in para-25 of his deposition are incorrect as to the number of keys recovered by him from Bichchhuwada police, we are not inclined to accept that this has created any infirmity or any vital contradiction.

One another infirmity pointed out by Mr.

Thakkar is that IO has admitted that he has attempted to create evidence against accused persons to implicate them in a serious crime, otherwise, there was no need to call videographer while drawing second part of panchanama at Bichchhuwada on the next date morning because that panchanama was not the discovery panchanama in the eyes of law. In the same way, after completion of section 27 panchanama at Navli at the instance of accused No.5, there was no need for IO to call Jatin Bhagat again- an important witness of prosecution- to go and call for videographer, though every formality was over by the time the videographer had reached to the spot i.e. Navli Gurukul Complex at Navli and so there was no need for the IO to ask the videographer to videograph the things again as if everybody is participating in a drama. Such evidence would not have helped at all. But this enthusiasm goes to the root of the expected fairness on the part of the prosecution. In number of cases, it is experienced by the Courts of this country that the investigating agency, in number of cases, is

collecting inadmissible evidence or collecting such evidence by using illegal means. In such a situation, inadmissible or ignorable evidence requires to be ignored. If both these tapes are ignored in toto, being a result of unwarranted enthusiasm, it does not go to the root of the evidence collected because the discovery of the fact under section 27 was already made on much earlier date when accused No.3 took the investigating agency on the spot resulting into some misunderstanding between the villagers and CBI Officials. The second part of panchanama, of course, has been described as second part of panchanama, but in the opinion of this Court, it is an independent recovery panchanama and is a panchanama out of the ambit of section 27 of the Evidence Act. In the same way, the videography made at Navli Gurukul, being inadmissible, need not be gone into, but this part of enthusiasm would not make the panchanama that was drawn qua the discovery of fact by accused No.5 or also would not make the entire Navli story as improbable story. This Court is in agreement that the extreme fairness is expected from the

investigating agency deployed, but in absence of extreme transparency unless it is proved to be prejudicial to the defense side, would not go against the strength of the case placed by the prosecution, otherwise, some error here or there or some overdoing by IO would destroy the case of a genuine victim.

It is true that PW Chiman as well as Nautam Swami and Premswarup Swami were rounded up as suspects of the offence of abduction and they were in custody of CBI for a very long period, but it emerges from the circumstances relevant to the story placed by the prosecution that IO Mr. Krishikar probably has settled with PW Chiman and other persons including Nautam Swami and Premswarup swami and, therefore, they were dropped for the net of the prosecution. In the same way, one Gyanprakashdasji who had claimed muddamal along with accused Nos. 1 & 2 by placing the claim under section 451 of CrPC and Acharya Maharaj Ajendraprasadji were also amongst the suspects. Acharya Maharaj Ajendraprasadji was arraigned as an accused, but

for the reasons best known to the IO, he has decided to drop him from the net of the prosecution. So, the accused have been arraigned as per the wish and whim of IO. Pick & Choose method is applied in the present case by IO, otherwise, there was active role by Acharya Maharaj Ajendraprasadji in reference to the item agenda proposing the transfer of Kotharis and Poojaris of the temple etc. But, as discussed earlier, there was a writ petition filed by PW Jatin Bhagat in this Court and serious impeachments were made against the persons who were not arraigned as accused in the crime. Thereafter, on the order passed by this Court, the ld. CJM offered an opportunity of being heard to the complainant and after hearing the complainant as well as investigating agency and the State, the ld. CJM had accepted the report submitted under section 169 of CrPC qua the accused named in column No.2 of the final report submitted under section 173 of CrPC. Thereafter, the judicial order accepting the report of CBI was passed and the same was not challenged either by the complainant or the accused

persons. So, the dropping of certain persons from the net of the prosecution is accepted position under judicial orders. To have an ill-feelings or inimical attitude would not put that person in a category of a person sharing the motive of a crime. There may be groups within a group and even there is a scope of inner circle of persons when the establishment is either a big one or has a complex structure of the hierarchy. So, it is accepted by this Court that Acharya Maharaj did take active interest and had remained successful also in preventing the discussion and passing of a resolution qua the transfer of Kotharis and Poojaris of other temples including the transfer of Chief Kothari of Vadtal temple, but the insistence to continue with the idea of transfer of Kotharis and Poojaris had resulted into cultivation of a motive, in nutshell is the case of the prosecution. As discussed earlier, the theory of elimination was adopted by the investigating agency which can be said to be duty and privilege of the IO. So, the involvement after formation of motive or development of it, would

make a person co-conspirator or a person involved in an offence of a criminal conspiracy. If IO Mr. Krishikar had settled with any of the suspects including PW Chiman Parmar or PW Premswarup Swami, they could have supported the case of the prosecution in toto. On the contrary, an impression is created in the mind of the Court is that of leaning of most of the witnesses who were residents of or connected with Vadtal temple complex and its activities, towards the accused persons. Even the prosecution has led evidence proving this important circumstance against the accused.

It is settled legal position that failure to conduct the investigation properly is a curable defect or lacuna, unless the court is satisfied that illegality committed or unfairness found in the course of investigation or institution of report is shown to have brought about the miscarriage of justice. Here in the present case, the allegation as to some unfairness shown by the IO Mr.Krishikar or the lacuna pointed out before the Court are not

found prejudicial resulting into the miscarriage of justice. It is true that the duty of the IO is not merely to boost up the prosecution case with such evidence as may enable the Court to record the conviction , but to bring out the real unvarnished truth. Some attempt in the present case of doing varnishing on certain facts is not found capable of changing the basic colour of the case of the prosecution. The Apex Court, in the case of **Karnel Singh v/s State of MP, AIR 1995 SC 2472,** has observed in paras 4 to 6 of the cited decision qua the duty of investigating officer and as to the defective and/or unfair investigation. It would be appropriate to reproduce the observations made in those paras:-

> 4. We have very carefully scrutinized the evidence having regard to the fact that (PW 6) the Investigation Officer had not taken the care expected of him. He did not record the statements of the two witnesses nor did he refer to the attachment of the 'Chaddi' in his oral evidence. That was a very vital piece of evidence to which little or no

attention was paid. If the seizure of that article was properly proved, the article with semen stains would have lent strong corroboration to the evidence of the prosecutrix. There is no doubt that the investigation was casual and defective. But despite these deficiencies both the Courts below have recorded a conviction. The question is : are they right?

5. Notwithstanding our unhappiness regarding the nature of investigation, we have to consider whether the evidence on record, even on strict scrutiny, establishes the guilt. In cases of defective investigation the Court has to be circumspect in evaluating the evidence but it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the Investigating Officer if the investigation is designedly defective. Any Investigating Officer, in fairness to the prosecutrix as well as the accused, would have recorded the statements of the two witnesses and would

have drawn up a proper seizure-memo in regard to the 'Chaddi'. That is the reason why we have said that the investigation was slip shod and defective.

6. We must admit that the defective investigation gave us some anxious moments and we were at first blush inclined to think that the accused was prejudiced. But on closer scrutiny we have reason to think that the loopholes in the investigation were left to help the accused at the cost of the poor prosecutrix, a labourer. To acquit solely on that ground would be adding insult to injury.

In view of above, the say of ld. Sr.Counsel Mr. Thakkar is not found acceptable that on account of absence of fairness shown by the investigating agency, the Court should hold that this absence on the part of the Investigating Officer has resulted into serious prejudice to the accused and it goes against the prosecution. There is remarkable difference between the extrimity in absence of fairness and absence of

extreme fairness.

(liv) We have considered the role that CBI and IO has played in the investigation of this crime. Certain lacunas are there and they are apparent, but this Court is not ready to accept the say of Mr. Thakkar that these lacunas collectively make the case of the prosecution doubtful. The first important lacuna is that the investigating agency has not even cared to draw the map of Vadtal temple complex including the residential house of abducted Guru Gadadharanandji and Lakkadpitha Vanda. The details of total entry and exist gates are also not exactly found from the evidence collected during investigation. There is no explanation from the IO that how the owner of a medical store could sell a schedule drug without prescription and that too without payment. Even bill was not there with the trader. Even then that particular medical stores owner has been cited as a witness. It is in evidence that Acharya Maharaj at relevant point of time i.e. at proximate date was at Nasik. When it is the

say of the prosecution that he had a telephonic conversion from Nasik that missing Guru Gadadharanandji, then cogent evidence as to his visit to Nasik, his place of stay could have been brought on record by the prosecution during the trial. It was not impossible for the IO to collect the print-outs of the telephone used by Acharya Maharaj Ajendraprasadji. In the same way, the fact whether accused Nos. 1 or 2 or both of them were having mobile telephone with them or not is also not found from the evidence. When it is the case of the prosecution that accused No.1 Narayan Shashtri had telephoned accused No.2 Shrijicharan Swami during the visit of accused No.2 at Nadiad, then the details as to use of telephone by accused No.1 Narayan Shahtri as well as accused No.2 Shrijicharan Shashtri could have been collected during the interrogation or by getting telephone print-out as to the use of telephone. If such telephone print-outs were not available from either Cellular Telephone Service Provider Company or from BSNL, then the negative evidence about the non-availability of such evidence also could

have been brought on record to seal even a minor lacuna capable of giving rise to any argument against the transparency in investigation. The very officer Mr. Krishikar as mentioned earlier, had given erroneous reply qua the number of keys seized from Bichchhuwada police and even in describing the key marks in one of the seizure memos. There is no explanation as to why the original document on the strength of document exh.95 was not seized by IO Mr. Krishikar and why the same has not been brought on record. In the same way, how such zerox copy had reached to the accused if the original was once with CBI, is a question which ought to have been replied satisfactorily by IO Mr. Krishikar. In the same way, qua the statement of Ramanbhai Parmar, how two statements signed by him could exist and one such statement is reaching to the accused in the copies of the papers given to the accused as a part of final report, is also a question. There was no need for IO Mr. Krishikar to have videography of Navli Gurukul because any such exercise would not have added any strength to the case of the prosecution. On the

contrary, such exercise would give rise to some doubt even as to the genuineness of the exercise that was carried out earlier on the discovery of fact as to the place of murder by accused No.5. In the same way, it is claimed by IO Mr. Krishikar that erroneously he has not done the calculation of the documents as to the investment of huge amount made by accused No.2 in his name or in the name of either Guru, Gurubhai or disciple. This fact is stated by Mr. Krishikar in his affidavit that was submitted prior to the pronouncement of the judgment and that document is at exh.326. The order of return of some of the muddamal articles including cash amount was passed in the month of May-2000, but for long period, those articles were not returned to the persons in whose favour the Court has passed the order. These aspects need consideration. It appears that seizure of original documents i.e. treatment case papers of Dr.Diwanji would not have destroyed the case of the prosecution as discussed earlier. Overdoing by IO Mr. Krishikar in getting exh.95 prepared was an error of an over-enthusiastic officer.

Failure in getting telephone print-outs as to the use of telephone by accused No.1 Narayan Shashtri and Acharya Maharaj from Nasik is a lacuna, but it is not a lacuna which would prove fatal. In the opinion of this Court, this could have added some more strength to the case of the prosecution. So, the evidence which is necessary to add some more strength if is found missing, would not kill the basic case of the prosecution. Inadvertences shown while selecting panchas non-preparation of map of Vadtal temple complex or the error in describing the key in the seizure panchanama and answering wrongly to a question put forward in the cross-examination, etc. are the mistakes which get their resolution from other evidence i.e. facts proved by the prosecution. In the same way, two statements of a prosecution witness where a material improvement and difference is found, is also not capable of making the case against the accused except accused No.4, weak. Accused No.4 wold get an advantage and we have discussed this part of evidence in detail in earlier paras of this judgment.

(45) Before parting, we would like to refer to the observations made by the Apex Court in the case of **Firozuddin Basheeruddin & Ors. v/s State of Kerala, 2001 SCC (Cri.)1341.** The Apex Court, in the said decision has observed that " as regards the admissibility of evidence, strict standards are not necessary inasmuch as any declaration made by a conspirator in furtherance of and during the pendency of conspiracy, though hear-say, is admissible against each co-conspirator." So, the discovery of fact by accused No.3 as a conduct subsequent to the commission of a crime, positively can be used against all the accused who are conspirators of the main crime, including the declaration made before the insurance company. In our view, the Apex Court was dealing with the declaration made by a co-conspirator in reference to a scheme of section 10 of the Evidence Act, but it is possible to observe on the strength of the basic view expressed by the Apex Court that this is a case where loosened standards should be permitted to prevail being a conspiracy

trial. Contrary to usual rules, in conspiracy prosecutions, any declaration, disclosure or a conduct of one conspirator if is found in furtherance of a conspiracy and during its pendency, can be considered in visualizing the chain suggested by the prosecution. So, in our view, the prosecution has successfully established the charges beyond doubt in a case purely based on circumstantial evidence against accused Nos. 1,2, 3 & 5. However, there is some cloud of doubt so far as accused No.4 is concerned and he should be given an advantage of it and, therefore, he gets advantage of that cloud of doubt and it is held that the prosecution has failed to establish the guilt against accused No.4 Ghanshyam Prkashdasji Guru Hrikishndasji (Original name : Ghanshyambai Haribhai Akoli).

(46) So far as punishment is concerned, we have discussed the law as to capital punishment and the discussion made above itself gives an impression that the present case does not fall within the category of the “rarest of the rare

case”. For property, possession or power, large number of cold-blooded murders are being committed and one such murder is of deceased Guru Gadadharanandji. Each kind of such murder can not be equated with a case which can be termed as “the rarest of the rare case”. So, we are not inclined to confirm the death penalty imposed by the trial Court. The minimum punishment prescribed for the offence punishable under section 302 of IPC is life imprisonment and, therefore, we impose R/I for life on accused Nos. 1,2,3 and 5 for the offences punishable under section 302 R/w Sec.120-B of IPC, meaning thereby judgment and order of conviction passed against accused Nos.1,2, 3 & 5 is hereby confirmed.The conviction of the appellants accused Nos.1,2,3 & 5 for the offence punishable under section 364 R/w Sec.120-B of IPC is hereby confirmed. However, the order imposing sentence to the aforesaid appellants accused to undergo R/I for life is hereby modified and reduced and the aforesaid appellants accused are ordered to undergo R/I for 10 Years and to pay a fine of Rs.25,000/

(Rs. Twenty five thousand only), I/d to further undergo R/I for One Year for the offence punishable under section 364 R/w Sec.120-B of IPC. Rest of the order of conviction and sentence passed against accused Nos. 1,23 & 5 is hereby confirmed. However, the accused No.4, as aforesaid, is hereby acquitted of the offences with which he has been held guilty and sentenced by the ld. Trial Judge vide impugned judgment, by giving him benefit of doubt. No formal sentence is imposed qua the offence punishable under section 120-B of IPC.

(47) For the foregoing reasons, the Confirmation Case No. 5/2004 is hereby dismissed. Criminal Appeal No.1005/2004 is hereby partly allowed. The impugned judgment and order of conviction and sentence passed by ld. Presiding Officer & Addl. Sessions Judge, Fast Track Court, Nadiad in Sessions Case No.369/1999 dated 11.06.2004 so far as accused No.4 Ghanshyam Prakashdasji Guru Hrikishndasji (Orig. name Ghanshyambai Haribhai Akoli) is hereby quashed and set aside by giving him benefit of doubt and he is acquitted of the

offences with which he is charged and held guilty. Accused No.4 is ordered to be set at liberty forthwith if not required to be detained in any other case. However, the conviction of the appellants accused Nos. 1,2,3 & 5 for the offences punishable under sections 302, 364, 201 R/w section 120-B of IPC passed by ld. Presiding Judge & Addl. Sessions Judge, Fast Track Court, Nadiad dated 11.06.2004 in Sessions Case No.369/1999 is hereby confirmed, but the sentence of death imposed on the appellants accused Nos. 1,2,3 & 5 for the offence punishable under section 302 R/w Sec.120-B of IPC, is hereby modified into the one of R/I for Life. Each of the accused Nos. 1,2,3 & 5 are hereby sentenced to undergo R/I for life for the offence punishable under section 302 R/w Sec.120-B of IPC. No separate sentence for the offence punishable under section 120-B is imposed. The conviction of the appellants accused Nos.1,2,3 & 5 for the offence punishable under section 364 R/w Sec.120-B of IPC is hereby confirmed. However, the order imposing sentence to the aforesaid appellants accused to

undergo R/I for life is hereby modified and reduced and each of the aforesaid appellants accused is ordered to undergo R/I for 10 Years and to pay a fine of Rs.25,000/ (Rs. Twenty five thousand only), I/d to further undergo R/I for 1 Year for the offence punishable under section 364 R/w Sec.120-B of IPC. No separate sentence for the offence punishable under section 120-B is imposed. The order of conviction and sentence passed by ld. Trial Judge against accused Nos. 2,3 & 5 for the offences punishable under section 201 R/w section 120-B is hereby confirmed and no separate sentence for the offence punishable under section 120-B is imposed. The accused shall be entitled to set off as contemplated under section 427 of CrPC. The order as to disposal of muddamal is also upheld. Substantive sentences to run concurrently.

It is hereby further ordered that the accused Nos. 1 & 2 shall return the entire amount received by them by way of interim arrangement under the orders of the Court passed in exercise of the jurisdiction vested with the

Court under section 451 of CrPC, within sixty (60) days from the date of pronouncement of this judgment. The ld. CJM shall conduct the inquiry about the rival claim that may be placed before the Court and decide as to whom the valuables including cash should be handed over and why. Vadtal Temple Board Trust also be heard and notice to Charity Commissioner be issued by the ld. CJM concerned before final disposal of the muddamal because the Court feels that the amount probably might have been received by and on behalf of a religious charitable public trust and for its benevolent activities. Criminal Appeal No. 1005/2004 filed by the appellant accused is partly allowed to the extent indicated herein above.

[C.K. BUCH, J]

[K.A.PUJ, J]

*rawal